

THE USE OF HYPNO-INDUCED STATEMENTS IN CRIMINAL CASES

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1. A BRIEF INTRODUCTION TO THE MEDICO-LEGAL ASPECTS OF HYPNOSIS

Although the phenomenon of hypnosis has been known for centuries,¹ scientific research on the medico-legal aspects of hypnosis did not begin until about 1860.² Thereafter, in numerous studies and monographs, consideration was given to such questions as whether criminal acts can be perpetrated upon a hypnotized person by the hypnotist,³ and whether a person who has manifested no anti-social tendencies can be induced by hypnosis to commit crimes.⁴ Research was stimulated by three notable European criminal cases. Two of the cases were said to have involved crimes committed by the hypnotist. In 1865 a French court sentenced one Castellan to 12 years imprisonment for seduction abetted by hypnosis,⁵ and in 1894 a German court tried one Czynski for a similar offense.⁶ The third case involved not only the defense that the

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¹ For brief surveys of the history of hypnosis, see 14 Encyclopedia Americana 604 (1950); 12 Encyclopedia Britannica 23 (1958); Reiter, *Antisocial or Criminal Acts and Hypnosis* 34 (1958); Conn, "Historical Aspects of Scientific Hypnosis," 6 J. Clinical & Experimental Hypnosis 17 (1957); Hamm, "Hypnotism in the Far East," 14 Medico-Legal J. 323 (1896); Ladd, "Legal Aspects of Hypnotism," 11 Yale L. J. 173, 174 (1902).

² Reiter, *op. cit. supra* note 1; Ladd, *supra* note 1.

³ Reiter, *op. cit. supra* note 1; Ladd, *supra* note 1, at 178.

⁴ Reiter, *op. cit. supra* note 1; Ladd, *supra* note 1, at 180-84.

⁵ Allen, "Hypnotism and its Legal Import," 12 Can. B. Rev. 80, 81 (1934); Ladd, *supra* note 1, at 178.

⁶ Forel, *Hypnotism and Psychotherapy* 290 (1907); Allen *supra* note 5, at 82; Bell, "Hypnotism and the Law," 13 Medico-Legal J. 47, 50 (1895); Ellinger, "The Case of Czynski," 14 Medico-Legal J. 150 (1896). Czynski was charged with seduction, procuring a friend to pretend that he was a clergyman and to perform a sham marriage ceremony, and attempting to obtain money by false pretenses. Whether he was convicted of the seduction charge is questionable. Allen, *supra*, states that he was acquitted. Bell, *supra*, and Ellinger, *supra*, assume that he was convicted. In the most recent comment on the case, it is stated that Czynski was acquitted. Bryan, *Legal Aspects of Hypnosis* 170 (1962).

crime had been induced by hypnotic suggestion but also the use of hypnosis for investigative purposes. The defendant, Gabrielle Bompard, was tried by a French court for murder. Her defense was that she had acted under the irresistible impulse of hypnotic suggestion. To prove the validity of her claim, she consented to be interrogated under hypnosis. The extrajudicial experiment, conducted by the experts Charcot and Brouardel, resulted in an advisory opinion against her claim, and she was convicted.⁷

These cases, particularly *Bompard*, had an immediate impact upon the defense tactics of American criminal lawyers, and, from 1894 to 1915, there were a number of cases involving either the defense of hypnotic suggestion,⁸ or the admissibility of exculpatory statements made under hypnosis.⁹ In addition, several cases dealt with the alleged seduction of the hypnotized subject.¹⁰ However, judicial hostility was manifest,¹¹ and in none of these cases did the interjection of the hypnosis issue have any appreciable effect. The result was that just as suddenly as the problem of hypnosis had become important in American criminal law, so it lost its importance, and, from 1915 until 1950, there was but one reported case dealing with any medico-legal aspect of hypnosis.¹² In the last decade, however, probably as a result of the increased use of

⁷ Ladd, *supra* note 1, at 183, 187. See Forel, *op. cit. supra* note 6, at 287. Neither author indicates the date of the case, and I have been unable to ascertain it. However, references to the case may be found as early as 1895. Bell, *supra* note 6, at 47, 50. During the 1890's Dutch authorities proposed to use hypnosis to elicit from a murder suspect information regarding the missing victim. However, the proposal was abandoned. See 23 Wash. L. Rep. 534, 535 (1895); 95 Law Times 500 (1893).

⁸ *People v. Worthington*, 105 Cal. 166, 38 Pac. 689 (1895). In Ladd, *supra* note 1, at 183, the unreported case of *State v. McDonald* (Kan. 1895) was said to have involved the same problem. However, subsequent investigation demonstrated beyond doubt that the defense of hypnosis was not raised. Bell, *supra* note 6, at 51-54. The same error was made regarding the unreported case of *State v. Blitz* (Minn. 1895). Compare Steele, "Hypnotism and Justice," 16 N. Am. Rev. 503 (1895), with Sudduth, "Hypnotism and Crime," 13 Medico-Legal J. 239, 241 (1895). In each instance the alleged hypnotist was convicted of procuring another to commit murder. *State v. Gray*, 55 Kan. 135, 39 Pac. 1050 (1895); *State v. Hayward*, 62 Minn. 474, 65 N.W. 63 (1895). Neither reported case contains any reference to hypnosis.

⁹ *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049 (1897), 15 Medico-Legal J. 240 (1897), Annot., 40 L.R.A. 269 (1915); see *Austin v. Barker*, 110 App. Div. 510, 96 N.Y. Supp. 814 (1906).

¹⁰ *Tyrone v. State*, 77 Tex. Crim. 493, 180 S.W. 125 (1915) (seduction asserted as provocation for homicide); *Austin v. Barker*, *supra* note 9 (civil action for seduction); *State v. Donovan*, 128 Iowa 44, 102 N.W. 791 (1905).

¹¹ See *People v. Ebanks*, *supra* note 9; *State v. Exum*, 138 N.C. 599, 50 S.E. 283 (1905).

¹² *Louis v. State*, 24 Ala. 120, 130 So. 904 (1930). The defendant allegedly procured property from his victim by hypnosis. His conviction for robbery was reversed

hypnosis in medical practice,¹³ the problems have again arisen, not only in criminal cases,¹⁴ but also in several recent books¹⁵ and articles.¹⁶

This article is written in light of the renewed interest in the relationship between hypnosis and criminal law. However, at the outset it should be noted that the article is limited in scope. There will be no discussion of the use of hypnosis in the commission of crime. Rather, this article will deal with the use of hypnosis prior to trial as an investigative aid, the admissibility of extrajudicial statements made under hypnosis, and the use of hypnosis during trial as a means for eliciting testimony. The focal point for this discussion will be the recent unreported case of *State v. Nebb*,¹⁷

on the ground that the evidence was insufficient to prove the elements of force or fear. The case is noted in 22 J. Crim. L. 279 (1932), wherein it is suggested that the court should have applied the doctrine of constructive force. For a complete discussion of the case, see Note, "Hypnotism, Suggestibility and the Law," 31 Neb. L. Rev. 575, 582, 585 (1952).

In 1928 a Canadian court held inadmissible a confession apparently obtained by hypnosis. *Rex v. Booher*, 4 D.L.R. 795 (Sup. Ct. Alta. 1928). The case is noted in Allen, *supra* note 5, at 91. At the same page Allen notes the unreported New York case of *People v. Smith* (1933) in which hypnosis was used to overcome amnesia, and the defendant's subsequent recollection led to a pre-trial determination of insanity. In *People v. Clark*, 70 Cal. App. 531, 233 Pac. 980 (1925), a murder case, it was noted that the decedent's wife, at the defendant's suggestion, forged the decedent's signature to a letter authorizing the defendant to open a safe deposit box. In a contemporary account of the case it was suggested that the wife acted under the defendant's hypnotic influence. Sloan, "Hypnotism as a Defense to Crime," 41 Medico-Legal J. 37 (1924).

¹³ Schneek, "Hypnosis in Psychiatry," in *Hypnosis in Modern Medicine* 143 (2d ed. 1959). The American Medical Association's approval in 1958 of the use of hypnosis in medical practice is reported in Bryan, *op. cit. supra* note 6, at 33.

¹⁴ See *Cornell v. Superior Court*, 52 Cal. 2d 99, 338 P.2d 447 (1959) (right to representation by counsel includes right to be interviewed by him under hypnosis); *People v. Marsh*, 17 Cal. App. 2d 284, 338 P.2d 495 (1959) (evidence insufficient to establish that defendant was induced by hypnosis to escape from prison); *State v. Nebb*, No. 39,540, Ohio C.P., Franklin Co., May 28, 1962 (by stipulation defendant testified under hypnosis); *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950) (held inadmissible exculpatory extra-judicial statements made by defendant under hypnosis). In *People v. Leyra*, 302 N.Y. 353, 98 N.E.2d 553 (1951), the court held that the evidence did not support defendant's claim that his confession was induced by hypnosis. Ultimately the conviction was reversed by the Supreme Court on the ground that the confession was involuntary. The opinion suggests that hypnosis was involved. *Leyra v. Denno*, 347 U.S. 556 (1954).

¹⁵ Bryan, *op. cit. supra* note 6; Donnelly, Goldstein & Schwartz, *Criminal Law* 556-58 (1962); Paulsen & Kadish, *Criminal Law and its Processes* 217-18 (1962); Reiter, *op. cit. supra* note 1; Williams, *Criminal Law, The General Part* §256 (2d ed. 1961).

¹⁶ Levy, "Hypnosis and Legal Immutability," 46 J. Crim. L., C. & P.S. 333 (1955); Note, "Hypnotism and the Law," 14 Vand. L. Rev. 1509 (1961).

¹⁷ *Supra* note 14.

apparently the first American case in which an accused has testified under hypnotic influence.

II. STATE V. NEBB, A LANDMARK?

A. *The Basic Facts.*¹⁸

Arthur Nebb was estranged from his wife, Bernice. On several occasions, prior to September 14, 1961, Bernice had sued for divorce, but the suits had been voluntarily dismissed. On September 14, 1961, a contested divorce action was pending, and Arthur was living with friends, the Olivers. The Nebb home was occupied by Bernice and the Nebb's daughter, Camelia. Camelia's fiancé, Nelson Stepp, lived across the street. The deceased, Estel Stepp, Nelson's cousin, resided in the Stepp home.

On September 14, 1961, in the early evening, Nelson telephoned Camelia and was invited to visit her. At Nelson's request, the invitation was extended to Estel, and he accepted. Shortly thereafter, the Stepps arrived and random conversation ensued. Bernice was present. She and Estel knew one another. On at least two occasions the Stepp family, Bernice, and Camelia were together, once for a picnic and once at a drive-in movie. Shortly after the Stepps arrived, Nelson and Camelia went to a grocery store. They were gone for about 15 to 30 minutes. Bernice and Estel remained in the house. With them were two wards of the State of Ohio who were being cared for by Mrs. Nebb. One of the wards was an infant; the other was a deaf-mute. As Nelson and Camelia departed, Arthur Nebb arrived, driving Oliver's automobile. Nelson and Camelia did not see Arthur. As Arthur walked to the porch, he looked through a window and saw Bernice and Estel. They were (he claimed) in a compromising position. He immediately returned to the Olivers' house. With great excitement he said that his wife was in bed with another man. He asked Mrs. Oliver to telephone his attorney, and he asked Mr. Oliver to return with him to the Nebb house to be a witness. He said either "I am going to kill them" or "I ought to kill them." Then he climbed into his truck and drove away. About five minutes later, Mr. Oliver left for the Nebb house. When he arrived, a crowd was already there. Arthur had shot Bernice and Estel with a gun that he kept under the seat of his truck. Bernice sustained multiple, but non-fatal, wounds. Estel, shot through the eye, died en route to the hospital. Arthur was indicted for first-degree murder.

At the trial, Bernice was the prosecution's key witness. However, under an interpretation of the spousal privilege, she was per-

¹⁸ With some exceptions, footnote references to pages in the transcript are omitted.

mitted to testify as to Arthur's acts occurring in the presence of third persons, but was not permitted to testify as to what occurred between her and Estel. She testified that Arthur had previously threatened to shoot her. Regarding the fatal shooting, she testified that Arthur entered the house, gun drawn, shortly after Nelson and Camelia returned; that she (Bernice) and Estel were then seated at opposite ends of a sofa; that Arthur stated, "I told you I'd get even with you, you bitch, and this is it"; that Arthur raised the gun over her head and fired at Estel; and that Arthur then fired repeatedly at her, stopping only when Camelia screamed.

The first five witnesses for the defense testified either that Arthur had a good work record or that he had a good reputation for truth. Arthur was then called to testify. After relating much information about his background, his work, a serious injury suffered at work, and domestic discord, he recounted his first visit to the Nebb house on the evening in question up to, but not including, what transpired between Bernice and Estel. Then, by agreement of counsel, Arthur's testimony was halted, the jury was temporarily excused, and Dr. T. R. Huxtable, Jr., a psychiatrist employed by the State of Ohio, was qualified by the defense as an expert witness on hypnosis.

B. *Dr. Huxtable's Testimony.*

1. The Uses of Hypnosis in Medicine.

Dr. Huxtable testified that the use of hypnosis is now established and accepted in medicine and psychiatry. Hypnosis has been used to induce analgesia for dental and obstetric operations. It has also been used to overcome a "therapeutic block" and retrograde amnesia.¹⁹

2. The Reliability of Statements Made Under Hypnosis.

Dr. Huxtable emphatically asserted, in direct and cross-examination, that statements made under hypnosis are reliable. He characterized hypnosis as "the royal road to the unconscious."²⁰ Answering a question regarding the subject's control of his statements under hypnosis, he said:

[There is] usually none; the statements you get usually are fact. I would have to qualify that, in certain types of mental disorders, this may not be true, but generally speaking, using the hypnosis or pentothal or amytal, or what is commonly referred to as "truth serums," you get the facts.²¹

¹⁹ Record, pp. 491-93.

²⁰ *Id.* at 492.

²¹ *Id.* at 494-95.

Dr. Huxtable admitted that a hypnotized person is easily subject to suggestion (post-hypnotic suggestion, for example),²² but not when he is being interrogated under hypnosis. He stated that it would be impossible for the subject to convince himself of the validity of a false factual premise and to maintain the conviction under hypnosis.²³ In his least affirmative statement, he conceded the possibility that the subject might lie, but he denied the probability.²⁴ To his statements in support of hypno-induced testimony, he added the qualifications that the person hypnotized must be a good subject for hypnosis;²⁵ that he must be in a true hypnotic trance;²⁶ and that techniques of hypnosis might prove ineffective with a psychopathic subject.²⁷

3. Comparative Reliability of Statements Made Under Hypnosis and Statements Induced by Narcosis.

At several points in this testimony, Dr. Huxtable compared the reliability of statements made under hypnosis and statements induced by drugs such as sodium pentothal and sodium amytal. One example is in the quotation above. Dr. Huxtable was quite affirmative in his opinion of the reliability of both methods. Indeed, he asserted that under either method a good subject would respond truthfully even though he was ordinarily a pathological liar.²⁸

4. Pre-Trial Relationship Between Huxtable and Nebb.

Dr. Huxtable testified that he had hypnotized and interrogated Arthur Nebb two or three times prior to the trial. He asserted that Nebb was a good subject. Finally, without objection, he stated, "It's my opinion that the statements he made to me on the two occasions that I saw him in a hypnotic trance were factual."²⁹

C. *The Hypnosis of Arthur Nebb.*

Dr. Huxtable assured the prosecuting attorney that he would not proceed unless he was completely satisfied that the defendant was in a hypnotic trance. Thereafter, out of the jury's presence, Nebb was hypnotized and was subjected to two tests to determine the depth of the trance. First, Nebb was told that his arm would be

²² *Id.* at 495.

²³ *Id.* at 499.

²⁴ *Id.* at 507.

²⁵ *Id.* at 502.

²⁶ *Id.* at 501.

²⁷ *Id.* at 498.

²⁸ *Id.* at 497.

²⁹ *Id.* at 496.

numb.³⁰ He accepted the suggestion and did not respond when the prosecuting attorney pricked his arm with a knife. Then Nebb was told to write his name both as he customarily does and as he did when he was in the fifth grade. Although the result of this test was not described for the record, it appears that the fifth-grade handwriting was significantly different from the adult handwriting, and that the fifth-grade signature contained an error in spelling.³¹

D. *Arthur Nebb's Testimony Under Hypnosis.*

In answer to questions put to him by the prosecuting attorney, Nebb stated that when he first arrived at the Nebb house, he saw Camelia and Nelson leave; that he did not try to avoid being seen by them; that a pre-trial statement to the contrary was not true and was made under confusion; that as he approached the house, he looked through a window and saw a hand reach for Bernice's outstretched hand; that Bernice kissed the man, took his hand, and walked with him into the dining room; that he (Nebb) then walked to the bedroom window; that Bernice and the man disrobed; that he (Nebb) wanted someone else to witness the scene; that he returned to the Olivers' house, asked Mrs. Oliver to call his attorney, and asked Mr. Oliver to follow him; and that he left the Olivers' house in his truck. When asked about his statement to the Olivers, he said, "I said, 'I got them both.'" When pressed about his answer, he admitted that he said "I ought to kill them both." Nebb testified further that he armed himself in order to force Bernice and the man to remain as he found them; that when he approached the house, he saw that Bernice and the man were not in bed; that he entered the house and was surprised to see Camelia and Nelson there; and that when he entered the house he had the gun in his right hand. Thereafter, he testified as follows:

Nebb: Went in the house—

Huxtable: Look in the direction you pointed it. Show us how you pointed it.

Nebb: Like this. Camelia and Clyde [Mrs. Nebb's son, adopted by Nebb when he married Mrs. Nebb] were over there.

Allison (prosecuting attorney): Camelia and who?

Nebb: Nelson, Nelson, Nelson.

Allison: Now,—

Nebb: Nelson and Camelia. Nelson—

Huxtable: Where was Estel?

Nebb: Estel? I don't know no Estel. I seen Nelson go for the living room [dining room?] and Bernice hollered, "What's the

³⁰ *Id.* at 509.

³¹ *Id.* at 511-12.

matter?" and Camelia jumped up, and just then Bernice jumped and grabbed me and the gun fired.

Huxtable: Stand up. You are all right.

Nebb: Fired.

Huxtable: You are all right.

Nebb: And I fired again.

Huxtable: How many times?

Nebb: Again.

Huxtable: What you see here is a reliving of the emotional reaction at the time this took place.

Nebb: She went down.

Huxtable: What did you do? How many times did you fire? How many times? How many times?

Nebb: Five. Five. Five.

Huxtable: You are all right. Stand up. You want to sit down on the chair? Open your eyes. Get in the chair again. Sit down. What did you do then?

Nebb: I thought she was dead. Camelia kept hollering at me and everything drained out of me.

Huxtable: Arthur, when you drove back from Jess Oliver's in that car [truck?] were you going back to kill Bernice?

Nebb: No, I just wanted to get back there and see who he was.

Allison: Were you going to kill him, Arthur?

Nebb: No, I didn't want to hurt anybody, I just wanted to—³²

The prosecuting attorney then questioned Nebb about a pre-trial statement in which Nebb apparently admitted that he intended to kill Bernice. Nebb admitted making the statement and explained that if Camelia had not yelled, he would have killed Bernice because "after the gun went off I couldn't stop myself." In answer to a series of questions, Nebb insisted that he dropped the gun on the living room floor before he left the house. Finally, Nebb denied, as he had previously in his testimony, that he saw any man in the living room other than Nelson when he returned to the house. Nebb was then brought out of hypnosis, complained of a headache, and was briefly re-hypnotized for purpose of inducing analgesia. A recess was then declared.

E. *Conclusion of the Trial.*

When the trial was resumed, the prosecuting attorney announced that he desired to amend the indictment and to proceed on a charge of manslaughter. Moreover, he announced that he had filed an information charging Nebb with aggravated assault. Nebb waived indictment and pleaded guilty to both offenses. Thereafter, Nebb received concurrent sentences to imprisonment.

³² *Id.* at 521-23.

F. *Some Observations About the Nebb Case.*

As might be expected, the *Nebb* case was commented upon in the newspapers.³³ Dr. Huxtable defended the use of hypnotism in the *Nebb* case.³⁴ An unnamed psychiatrist questioned the reliability of statements made under hypnosis and narcosis.³⁵ Further, he noted that Nebb had testified in the past tense which is "not ordinarily the way a hypnotized person talks."³⁶ Although the case was hailed as a "courtroom first,"³⁷ the characterization was inaccurate. The "first" was one of form rather than substance. Dr. Huxtable's testimony, the hypnotizing of Arthur Nebb, and Nebb's subsequent testimony were effected without objection by the prosecution. Moreover, the entire proceedings were conducted out of the presence of the jury. There was no judicial determination of the admissibility of Dr. Huxtable's statement that Nebb's pre-trial statements under hypnosis were factual; there was no judicial determination of the admissibility of the experiment; and there was no judicial determination of the reliability of statements made under hypnosis. Nevertheless, the case is important because it calls to the attention of the bar the possible forensic application of hypnosis. Further, it suggests many evidentiary problems already alluded to in this article. These problems will now be discussed.

III. HYPNOSIS AND THE LAW OF EVIDENCE, A COMPARATIVE ANALYSIS

A. *Introduction.*

It has already been noted that the number of American cases involving problems of hypnosis reached a peak between 1894 and 1915 and declined markedly thereafter.³⁸ In the 1920's hypnotism was all but ignored as a device for ascertaining truth and detecting deception.³⁹ But other devices were in an experimental stage, and their continued development posed difficult problems particularly in criminal cases. These other devices, the so-called "lie-detector" and "truth serum," have now given rise to a considerable body of case

³³ Columbus Dispatch, June 17, 1962, §A, p. 33, col. 1; p. 35, col. 5.

³⁴ *Id.* at §A, p. 33, cols. 3-4.

³⁵ *Id.* at §A, p. 33, cols. 7-8.

³⁶ *Id.* at §A, p. 43, col. 1.

³⁷ *Id.* at §A, p. 35, cols. 5-6.

³⁸ See text to notes 8, 9, and 10, *supra*.

³⁹ Note, "Hypnotism, Suggestibility and the Law," 31 Neb. L. Rev. 575 n. 1 (1952).

law⁴⁰ and comment.⁴¹ Thus, in analyzing the relatively few cases involving hypnosis and in predicting the probable judicial treatment of unresolved problems of hypnosis, it is necessary for purposes of detailed comparison to include a substantial excursus involving cases decided long after most of the hypnosis cases were decided. In this comparison illustrative problem cases will be used.

B. *The Use of Hypnosis as a Pre-Trial Investigative Aid for the Defense.*

Suppose that *D*, indicted for murder, neither admits nor denies his guilt when interviewed by his attorney. Rather, *D* insists that he has a retrograde alcoholic amnesia concerning the incident. The attorney, realizing the hopelessness of attempting to prepare a defense without *D*'s cooperation, seeks to have *D* hypnotized and to interrogate him while under the influence of hypnosis.

If *D* is not in pre-trial confinement and is willing to be hypnotized, no problem arises. But suppose that *D* is confined and that the director of the confinement facility refuses to permit the experiment. Does *D* have a legally enforceable right to be so interrogated? An answer to this question is not to be found in the lie-detector and truth serum cases which deal almost exclusively with the *admissibility* of evidence. Further, the use of the lie-detector, whether for purposes of business security⁴² or police investigation,⁴³ presupposes

⁴⁰ For a good collection of lie-detector cases, see Note, 33 Tul. L. Rev. 880 (1959). Equally good collections of truth serum cases are to be found in Dession, Freedman, Donnelly & Redlich, "Drug-Induced Revelation and Criminal Investigation," 62 Yale L.J. 313 (1953) [author hereinafter cited as Dession]; Note, "Some Problems Relating to the Admissibility of Drug Influenced Confessions," 24 Brooklyn L. Rev. 96 (1957); Comment, "Admission of Confessions and Denials Made Under the Influence of Drugs," 52 Nw. U.L. Rev. 666 (1957).

⁴¹ Regarding the lie-detector, see Arther, "The Lie Detector—Is It of Any Value?," 24 Fed. Prob. 36 (Dec. 1960); Cureton, "A Consensus as to the Validity of Polygraph Procedures," 22 Tenn. L. Rev. 728 (1953); Floch, "Limitations of the Lie Detector," 40 J. Crim. L. 651 (1950); Forkosch, "The Lie Detector and the Courts," 16 N.Y.U.L.Q. Rev. 202 (1939); Hardman, "Lie Detectors, Extrajudicial Investigations and the Courts," 48 W. Va. L.Q. Rev. 37 (1941); Inbau, "Some Avoidable Lie Detector Mistakes," 40 J. Crim. L. 791 (1950); Inbau, "Detection of Deception Techniques Admitted as Evidence," 26 *Id.* 262 (1936); Silving, "Testing of the Unconscious in Criminal Cases," 69 Harv. L. Rev. 683 (1956); Skolnick, "Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection," 70 Yale L.J. 694 (1961); Wicker, "The Polygraphic Truth Test and the Law of Evidence," 22 Tenn. L. Rev. 711 (1953). Regarding truth serum, see Despres, "Legal Aspects of Drug-Induced Statements," 14 U. Chi. L. Rev. 601 (1947); Gleis, "In Scopolamine Veritas," 50 J. Crim. L., C.&P.S. 347 (1959); Macdonald, "Truth Serum," 46 *Id.* 259 (1955); Moenssens, "Narcoanalysis in Law Enforcement," 52 *Id.* 453 (1961); Muehlberger, "Interrogation Under Drug Influence," 42 *Id.* 513 (1951); Sheedy, "Narcointerrogation of a Criminal Suspect," 50 *Id.* 118 (1959).

⁴² The lie-detector is frequently used in the periodic examination of employees of

the consent not only of the interrogee, but also of any other person whose consent might be required. Moreover, the lie-detector reaches not into the unconscious,⁴⁴ as do hypnotism and certain drugs, but tests only physiological responses and is, therefore, without value in overcoming amnesia.

Confronted by a lack of precedent, counsel for the defendant in *Cornell v. Superior Court*⁴⁵ successfully argued that the right to be represented by counsel included the right to be interrogated while hypnotized for the purpose of overcoming amnesia. Quite correctly, the Supreme Court of California rejected as irrelevant the prosecution's argument that statements made under hypnosis are inadmissible in evidence,⁴⁶ and held that the issue concerned discovery rather than admissibility.⁴⁷ Unfortunately, the court stated that "the use of hypnotism for the purpose desired is recognized by medical authorities."⁴⁸ Arguably the court thereby attached to the use of a discovery device a criterion of reliability or efficacy. However, the efficacy of the device should be irrelevant to discovery, and the defendant and his attorney should be permitted to take the risk of a false lead as an alternative to no information at all.^{48a}

large commercial organizations with a resulting decrease in losses attributable to employees. Such organizations may thereby be able to obtain lower premiums on insurance and bonds. Note, 29 Cornell L.Q. 535, 539-40 (1944). See Arther, "The Lie-Detector—Is It of Any Value?," 24 Fed. Prob. 36, 37-38 (Dec. 1960).

⁴³ Regarding the extent to which the lie-detector is used in police investigative work, see Wicker, "The Polygraphic Truth Test and the Law of Evidence," 22 Tenn. L. Rev. 711 (1953); Note, 29 Cornell L.Q. 535, 539 (1944). For an attack upon even the investigative use of the device, see Skolnick, "Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection," 70 Yale L.J. 694, 722-23 (1961).

⁴⁴ Skolnick, *supra* note 43, at 724, criticizing Silving, "Testing of the Unconscious in Criminal Cases," 69 Harv. L. Rev. 683, 687-89, 702 (1956).

⁴⁵ 52 Cal. 2d 99, 338 P.2d 447 (1959), noted in Levy, "Hypnosis and the Law," 41 Chi. B. Rec. 243 (1960); 11 Hastings L.J. 72 (1959). The action, in mandamus, was brought by defendant's attorney. Defendant's name was Conrey.

⁴⁶ The problem of admissibility is discussed *infra* at p. 12.

⁴⁷ Suppose, however, that the amnesia is overcome by hypnosis and that the subject is given a post-hypnotic suggestion to remember the events recalled under hypnosis. Is his subsequent testimony admissible? There is some indication that Conrey testified under post-hypnotic suggestion. See Mikesell, "Hypnosis in the Conrey Murder Case," in Bryan, *op. cit. supra* note 6, at 57-64.

⁴⁸ 52 Cal. 2d at 103, 338 P.2d at 449.

^{48a} In sharp contrast to the *Cornell* case is *State ex rel. Sheppard v. Koblentz*, 174 Ohio St. 120, 187 N.E.2d 40 (1962), in which it was held that the right to counsel did not include the right to be interrogated under hypnosis for the purpose of overcoming amnesia. Further, the court excluded examination by lie-detector. On the lie-detector point the court was correct if only because the lie-detector does not test the unconscious. See note 44, *supra*. On the hypnosis point, the *Sheppard* case arguably is distinguishable from the *Cornell* case in that *Cornell* involved pretrial proceed-

C. *Admissibility, Over Objection, of Exculpatory Statements Made Under Hypnosis.*

1. The Rule of Inadmissibility in Hypnosis Cases.

Suppose that *D*, indicted for murder,⁴⁹ claims the defense of alibi. His attorney is unable to find any corroborating witness, and, to test *D*'s story, has *D* hypnotized by a well-qualified medical hypnotist and then interrogates him. The interrogation is tape-recorded. *D* persists in his claim of alibi. At the trial *D*'s attorney offers into evidence the tape recording. The recording is properly identified and supported by proffered testimony of reliability. The prosecution objects. Should the objection be sustained? The case-law answer is yes.⁵⁰ In *People v. Ebanks*,⁵¹ the court, after noting that the trial court refused to permit the defendant's hypnotist to testify, said briefly, "We shall not stop to argue the point, and only add that the [trial] court was right."⁵² In *State v. Pusch*,⁵³ it was observed:

No case has been cited by either party relating to the admissibility of the evidence proffered and no case has been found. We think that the evidence was clearly inadmissible and that no error was committed in sustaining the objection.⁵⁴

These two cases comprise the sum of American case law on the question of the admissibility of exculpatory statements made under hypnosis.

2. The Rule of Inadmissibility in Lie-Detector and Truth Serum Cases.

In holding that statements made under hypnosis are inadmissible over objection, the *Ebanks* and *Pusch* cases are in accord with the lie-detector and truth serum cases. Regarding the lie-detector, it has been held with but a single exception⁵⁵ that exculpatory

ings and *Sheppard* involved post-appellate proceedings. However, the court did not make this distinction. Indeed, although the *Cornell* case was known to the court, see Brief for Relator, p. 4, the court, in a shocking opinion, did not even cite *Cornell*.

⁴⁹ The offense of murder has not been selected for dramatic effect. In a substantial majority of the cases involving the scientific devices under consideration, the defendant was charged with murder.

⁵⁰ *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049 (1897); *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950).

⁵¹ *Supra* note 50.

⁵² 117 Cal. at 666, 49 Pac. at 1053.

⁵³ *Supra* note 50.

⁵⁴ 77 N.D. at 888, 46 N.W.2d at 522.

⁵⁵ *People v. Kenny*, 167 Misc. 51, 3 N.Y.S.2d 348 (Co. Ct. 1938). The vitality of the *Kenny* case was sapped in *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31 (1938), when the New York Court of Appeals affirmed the trial court's refusal to permit the defendant to take a lie-detector test.

interpretations are inadmissible over objection.⁵⁶ Similarly, a trial court has been sustained in overruling a defense motion for discovery of the results of a lie-detector test already administered;⁵⁷ it has been held objectionable for defense counsel to ask in examination whether the defendant took a lie-detector test;⁵⁸ and it has been held objectionable for the defendant to testify that he is willing to take a lie-detector test,⁵⁹ whether the test is to be administered in court⁶⁰ or out of court.⁶¹ Regarding truth serum, it has been held without exception that exculpatory statements are inadmissible,⁶² and the rule of inadmissibility embraces testimony that the defendant was interrogated under narcosis,⁶³ an offer to testify under narcosis,⁶⁴ statements of willingness to be interrogated out of court under narcosis,⁶⁵ and the use of narco-induced statements in support of a motion for a new trial on the ground of newly discovered evidence.⁶⁶

3. Reasons for the Rule of Inadmissibility—The Requirements of General Scientific Acceptance and Reliability.

Although the *Ebanks* and *Pusch* cases are supported by analogous decisions, the inquiry is not over. Is the rule of inadmissibility a reasonable one? What purpose does it serve? How does it fit into the law of evidence? In answering these questions no help can be derived from such statements as "the court was right" and "the

⁵⁶ *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923); *People v. Becker*, 300 Mich. 562, 2 N.W.2d 503 (1942); *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949); *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1951); *Placker v. State*, 171 Tex. Crim. 406, 350 S.W.2d 546 (1961); *State v. Bohner*, 210 Wis. 651, 246 N.W. 314 (1933).

⁵⁷ *State v. McGee*, 91 Ariz. 101, 370 P.2d 261 (1962).

⁵⁸ *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495, *cert. denied*, 342 U.S. 898 (1951).

⁵⁹ *Ibid.*

⁶⁰ *Frye v. United States*, *supra* note 56; *Commonwealth v. Saunders*, 386 Pa. 149, 125 A.2d 442 (1956).

⁶¹ *People v. Porter*, 99 Cal. App. 2d 506, 222 P.2d 151 (1950); *People v. Forte*, *supra* note 55; *State v. Pusch*, *supra* note 56.

⁶² *People v. McNichol*, 100 Cal. App. 2d 544, 224 P.2d 21 (1950); *Dugan v. Commonwealth*, 333 S.W.2d 755 (Ky. 1960). *State v. Lindemuth*, 56 N.M. 257, 243 P.2d 325 (1952); *State v. Hudson*, 289 S.W. 920 (Mo. 1926); *Orange v. Commonwealth*, 191 Va. 423, 61 S.E.2d 267 (1950).

⁶³ *Henderson v. State*, *supra* note 58.

⁶⁴ *People v. McCracken*, 39 Cal. 2d 336, 246 P.2d 913 (1952). As an alternate ground for decision, the court held that if narco-induced testimony is admissible, admissibility is a matter for the trial court's discretion.

⁶⁵ *People v. Cullen*, 37 Cal. 2d 614, 234 P.2d 1 (1951); *Henderson v. State*, *supra* note 58.

⁶⁶ *United States v. Bouchier*, 5 U.S.C.M.A. 15, 17 C.M.R. 15 (1954).

evidence was clearly inadmissible," statements unaccompanied by analysis. But a basis for analysis is available. It is a general rule of evidence that a scientific experiment cannot be made part of the process of proof unless the experiment is "scientifically sound enough to merit general approval of its reliability"⁶⁷ by those who practice in the relevant branch of science.⁶⁸ Each of these conditions (general scientific approval, reliability) has been invoked to support the rule of inadmissibility in the lie-detector⁶⁹ and truth serum⁷⁰ cases. The condition of general scientific approval assumes some substantial use of the device or technique in the relevant science, and this assumption has created a stumbling block particularly with reference to the lie-detector. Perhaps because the device has from its inception been associated with criminal interrogation,⁷¹ perhaps because the device is too "adventurous" for academicians,⁷² those in the relevant sciences of psychology and physiology have not used the device experimentally, and, therefore, are in no position to accept it.⁷³ This matter aside, the principal problem pertaining not only to the lie-detector but also to truth serum is that of reliability.⁷⁴

⁶⁷ George, "Scientific Investigation and Defendants' Rights," 57 Mich. L. Rev. 37, 39 (1958).

⁶⁸ Wigmore, *The Science of Judicial Proof* §220, at 450 (3d ed. 1937).

⁶⁹ *Lack of general scientific approval*: *Frye v. United States*, *supra* note 56; *People v. Becker*, *supra* note 56; *People v. Forte*, *supra* note 55; *Henderson v. State*, *supra*, note 58. *Inbau and Reid, Lie Detection and Criminal Interrogation* 130 (3d ed. 1953) [author hereafter cited as *Inbau*]. *Lack of reliability*: *People v. Porter*, *supra* note 61; *People v. Becker*, *supra* note 56; *Boeche v. State*, *supra* note 56; *People v. Forte*, *supra* note 55; *State v. Pusch*, *supra* note 56; *Henderson v. State*, *supra* note 58; *State v. Bohner*, *supra* note 56. Bear in mind that these cases and the case in note 70, *infra*, deal with exculpatory results only.

⁷⁰ *Lack of general scientific acceptance*: *Dugan v. Commonwealth*, *supra* note 62; *State v. Lindemuth*, *supra* note 62; *Henderson v. State*, *supra* note 58. *Lack of reliability*: *United States v. Bouchier*, *supra* note 66; *Dugan v. Commonwealth*, *supra* note 62; *State v. Hudson*, *supra* note 62; *State v. Lindemuth*, *supra* note 62; *Henderson v. State*, *supra* note 58; *Orange v. Commonwealth*, *supra* note 62.

⁷¹ *Inbau, op. cit. supra* note 69, at 2-5.

⁷² *Id.* at 131.

⁷³ *Id.* at 130; Cureton, "A Consensus as to the Validity of Polygraph Procedures," 22 Tenn. L. Rev. 728, 740 (1953). Dr. Cureton's article contains a questionnaire submitted to lie-detector operators, observers, and experimenters. The answers indicate a direct relationship between forensic, as opposed to experimental, use and the degree of acceptance. Over all, the results are hardly a testimonial to scientific acceptance. For a more sanguine opinion of the results, see Trovillo, "Scientific Proof of Credibility," 22 Tenn. L. Rev. 743 (1953).

⁷⁴ It may be assumed that if there is sufficient evidence of the reliability of a scientific device or technique, general scientific acceptance will follow. Conversely, lack of general scientific acceptance is relevant to an argument against reliability. But it is by no means conclusive evidence of unreliability.

4. Reliability of the Lie-Detector.

a. *Some general observations.*

That form of the lie-detector known as the "Reid Polygraph" purports to record changes in the subject's blood pressure, pulse rate, respiration, conductivity by the hands of external electric current (psychogalvanic skin reflex), and muscular activity.⁷⁵ The psychological assumption underlying the operation of the lie-detector is that fear of detection, heightened by "key" questions, produces physiological changes.⁷⁶ These changes, recorded graphically, are interpreted by the examiner who renders an opinion that the changes indicate either truth or deception or that they are inconclusive. Initially, some consideration should be given to the underlying physiological assumptions. However, most commentators have avoided the matter and have concerned themselves with other aspects of the reliability problem.⁷⁷ Professor Skolnick is a noteworthy exception. In a recent article he states:

In sum, academic psychology and psychophysiology challenge both substantive assumptions underlying lie-detection theory: the assumption of a regular relationship between lying and emotional states, and the assumption of a regular and measurable relationship between emotional change and autonomic activity.⁷⁸

Whether Professor Skolnick's evidence⁷⁹ supports his conclusion need not be considered herein. Suffice it to say that his evidence does indicate difficulties in the process of measurement which difficulties, in turn, affect the task of interpretation and cast some doubt on the statistics of reliability.⁸⁰ However, hypnosis is not a technique of measurement and interpretation, and, for purposes of this article, the importance of Professor Skolnick's effort lies in its approach: the isolation and consideration of criteria of reliability.⁸¹

b. *Statistics of reliability.*

The foremost exponents of the use of the lie-detector as an investigative device *estimate* that the lie-detector is 95 per cent accurate *if used under the most favorable conditions.*

⁷⁵ Inbau, *op. cit. supra* note 69, at 4.

⁷⁶ *Id.* at 64.

⁷⁷ See generally articles regarding the lie-detector cited in note 41, *supra*.

⁷⁸ *Supra* note 43, at 703.

⁷⁹ *Id.* at 700-02.

⁸⁰ See pp. 15-16 *infra* for a discussion of the statistics of reliability.

⁸¹ Another criterion, that the device function properly, will not be considered in this article.

[I]n the examination of 100 subjects the examiner may make a definite and accurate diagnosis as to the guilt or innocence of 95 subjects. As to 4 of the subjects the examiner may be unable to arrive at a definite opinion as to guilt or innocence. With the 1 remaining subject the examiner may make an erroneous diagnosis of guilt or innocence.⁸²

Moreover, there is some evidence that most erroneous determinations favor the lying subject.⁸³ These statistical assertions have been accepted uncritically by some commentators who argue that the lie-detector is sufficiently reliable to warrant the admissibility into evidence of the examiner's conclusions.⁸⁴ Other commentators, however, have vigorously attacked these assertions of high reliability as based upon inadequate sampling.⁸⁵ Regardless of the adequacy of the sample, it must be admitted that the reliability problem is complicated by the fact that the devices of verification (subsequent confessions, convictions, acquittals) are not error-free. In addition, it must be kept in mind that the investigations upon which the statistics of high reliability are based were conducted under the most favorable conditions. The absence of any of these conditions would assuredly result in a diminution of reliability.

c. *The conditions of reliability.*

The conditions of reliability relate quite obviously to instrumentation, technique, subject, and examiner. Regarding instrumentation and technique, it is sufficient here to note Professor Inbau's admonition that there is not enough standardization to warrant an across-the-board rule of admissibility.⁸⁶ But even if standardization is eventually achieved, the subject of the test will continue to pose problems. Any of the following factors relating to the subject may give rise to an erroneous interpretation: (1) extreme nervousness, (2) physical abnormality, (3) mental abnormality, (4) unresponsiveness, and (5) muscular pressure or controlled breathing.⁸⁷ Whether the subject is fit for interrogation is to

⁸² Inbau, *op. cit. supra* note 69, at 111; Arther, *supra* note 42, at 39.

⁸³ Arther, *supra* note 42, at 39. This evidence suggests the danger of general observations about reliability. The examiner's conclusion of falsehood may be more reliable than his conclusion of truth.

⁸⁴ Hardman, "Lie Detectors, Extrajudicial Investigations and the Courts," 48 W. Va. L.Q. Rev. 37 (1941); Note, 29 Cornell L.Q. 535 (1944).

⁸⁵ Burack, "A Critical Analysis of the Theory, Method, and Limitations of the 'Lie Detector,'" 46 J. Crim. L., C.&P.S. 414 (1955); Skolnick, *supra* note 43.

⁸⁶ Inbau, *op. cit. supra* note 69, at 128.

⁸⁷ *Id.* at 65-66. See also Floch, "Limitations of the Lie Detector," 40 J. Crim. L. 651 (1950); Inbau, "Some Avoidable Lie-Detector Mistakes," 40 *Id.* 791; "Statement of Principles Regarding Polygraph ('Lie-Detector') Examinations," 48 J. Crim. L., C.&P.S. 568 (1958).

be determined by the examiner and, ultimately, the problem of reliability depends in large part on the examiner's qualifications.⁸⁸ In 1953 Professor Inbau stated:

[A]n examiner need not be a physician or a psychologist,⁸⁹ but he must be an intelligent person with a reasonably good educational background, preferably college training. He should have an intense interest in the work itself, a good practical understanding of human nature, and suitable personality traits which may be evident from his otherwise general ability to "get along" with people and to be well liked by his friends and associates. No amount of training and experience will overcome the lack of these necessary qualifications.

Many persons now functioning as lie-detector examiners do not possess these basic qualifications. They should never have been encouraged to embark upon such a career. Unfortunately, however, a number of established examiners have conducted schools for trainees and have followed a practice of accepting as students practically anyone who applied with the necessary tuition fee or who had been selected by his own police department or governmental agency to attend the school at his employer's expense.⁹⁰

That the situation has not changed materially since 1953 is apparent from the recent statement of a noted lie-detector examiner: "It must be remembered that there are few truly competent examiners."⁹¹

All of these factors (lack of standardization in instrumentation and technique, variations in subject, and lack of qualifications on the part of examiners) militate against a general rule of admissibility. But suppose that each of these factors is absent in a given case, that the machine is the most modern device in use, that the technique meets the highest standards of competent examiners, that the subject is fit for examination, and that the examiner is well-qualified. Should an *ad hoc* rule of admissibility be adopted if the foregoing can be proved? Professor Inbau does not argue for

⁸⁸ For a complete discussion of the qualifications of an examiner, see Inbau, *op. cit. supra* note 69, at 114-16. In a recent article it was concluded that, because mental illness may affect the reliability of lie-detector results, the examiner should be trained in the recognition of mental illness. Heckel, Brokaw, Salzberg, Wiggins, "Polygraphic Variations in Reactivity Between Delusional, Non-Delusional, and Control Groups in a 'Crime' Setting," 53 J. Crim. L., C. & P. S. 380 (1962).

⁸⁹ Professor Skolnick states that the task of the lie-detector examiner is more difficult than the task of a psychiatrist. The latter may be called upon to decide whether the subject *has a tendency to lie*. The former must decide whether the subject *is lying* about a particular event. Skolnick, *supra* note 43, at 707. For a comparison of the training of a lie-detector examiner with the training of a psychiatrist, see *ibid.*

⁹⁰ Inbau, *op. cit. supra* note 69, at 114.

⁹¹ Arther, *supra* note 42, at 39.

such a rule. His position, as of 1953, is summarized in the following statement: "Until the previously estimated accuracy is generally attainable, and a much higher degree of standardization achieved, the courts should continue to withhold judicial sanction of lie-detector test results."⁹² And, in an early case in which evidence of falsehood was admitted by stipulation, the noted examiner, Leonarde Keeler, testified that he "would not want to convict a man on the grounds of the records alone."⁹³ If there is hesitation and reluctance on the part of noted examiners, what is to be expected of the courts?

d. *The Judicial approach to the problem of reliability.*

It has already been stated that courts, with but one exception, have excluded the results of lie-detector tests generally on the ground of unreliability. What do courts mean by "unreliability"? Some courts mean in part that there is judicial precedent for a determination of unreliability and that the precedent will be followed.⁹⁴ Other courts rest in part upon Professor Inbau's argument against a general rule of admissibility without considering whether in the particular case the results might be reliable.⁹⁵ The Supreme Court of Nebraska has decried the fact that "a *wholly accurate* test is yet to be reported,"⁹⁶ and the Supreme Court of Michigan has refused to sanction admissibility "until it is established that *reasonable certainty* follows from such tests. . . ."⁹⁷ (Emphasis added.) Although cases can be found in which a court has expressed its unwillingness to take the risk that the subject was unfit for examination,⁹⁸ or that the examiner was incompetent,⁹⁹ such cases are few and the expressions are made without reference to the facts of the particular case. In sum, the judicial treatment of the reliability problem is superficial in the extreme. But several things are clear: a particularly high standard of reliability ("wholly accurate," "reasonable certainty") is required; and fears, unrelated to facts, will carry the day.

Why should such a high standard be required? It is not

⁹² Inbau, *op. cit. supra* note 69, at 128.

⁹³ Inbau, "Detection of Deception Technique Admitted as Evidence," 26 J. Crim. L., C.&P.S. 262, 267 (1936).

⁹⁴ State v. Arnwine, 67 N.J. Super. 483, 171 A.2d 124 (1961); State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945); State v. Bohnner, 210 Wis. 651, 246 N.W. 314 (1933).

⁹⁵ State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495, *cert. denied*, 342 U.S. 898 (1951).

⁹⁶ Boeche v. State, 151 Neb. 368, 378, 37 N.W.2d 593, 597 (1949).

⁹⁷ People v. Becker, 300 Mich. 562, 566, 2 N.W.2d 503, 505 (1942).

⁹⁸ Boeche v. State, *supra* note 96.

⁹⁹ Henderson v. State, *supra* note 95.

required of eye-witness testimony identifying the accused as the perpetrator of a crime even though there have been many cases in which the testimony was accepted by the jury and was later proved to be unreliable.¹⁰⁰ Indeed, even if it is shown at the trial that a witness has testified falsely to certain matters, the jury is not required to disregard all of his testimony.¹⁰¹ The maxim *falsus in uno, falsus in omnibus* relates to weight rather than admissibility.¹⁰²

On the other hand, it may be argued that it is within the common experience of jurors to evaluate and act upon statements made to them by others, but that it is outside their common experience to evaluate the reliability of a scientific device. Thus, runs the argument, if the results of a lie-detector test were admitted, the jury would accept them uncritically. As one commentator has observed:

Underlying [the requirement of high reliability] is the fear that the jury will accept a scientific device as absolutely reliable, without consideration of any possible percentage of error in its operation which may have impact on the fact issues which they are to decide.¹⁰³

This observation is, of course, speculative, and the available empirical evidence is hardly conclusive. In an unreported 1935 Wisconsin case, Leonarde Keeler was permitted by stipulation to testify that he had given a lie-detector test to the defendants and that the results indicated falsehood. The defendants were convicted, and thereafter each juror indicated, in answer to a question put by the judge, that he had received considerable assistance from the testimony in assessing the credibility of the defendants and of prosecution witnesses whose testimony contradicted the defendants' testimony.¹⁰⁴ In *People v. Kenny*,¹⁰⁵ the only reported case in which the results of a lie-detector test were admitted over objection, Father Summers, inventor of the Summers pathometer, testified

¹⁰⁰ Cases of mistaken identity are collected in Borchard, *Convicting the Innocent* (1932) and Frank & Frank, *Not Guilty* (1957). In Houts, *From Evidence to Proof* 3-10 (1956), the author recounts a classroom demonstration in which the students were unable accurately to identify the participants. He concludes, at 10-11, "the experiment illustrates the well-established but often forgotten rule that eyewitness identification is the most unreliable form of evidence and causes more miscarriages of justice than any other method of proof." For indications of the unreliability of lay-witness identification of handwriting, see Inbau, "Lay Witness Identification of Handwriting," 34 Ill. L. Rev. 433 (1933).

¹⁰¹ *State v. Willard*, 346 Mo. 773, 142 S.W.2d 1046 (1940).

¹⁰² *Shecil v. United States*, 226 Fed. 184 (7th Cir. 1915).

¹⁰³ George, "Scientific Investigation and Defendants' Rights," 57 Mich. L. Rev. 37, 39 (1958). See also, Inbau, *op. cit. supra* note 69, at 128.

¹⁰⁴ The case is recounted in Inbau, *supra* note 93, at 268 n.5.

¹⁰⁵ 167 Misc. 51, 3 N.Y.S.2d 348 (Queens Co. Ct. 1938).

that he had given a lie-detector test to the defendant and that the results indicated truth. The defendant was acquitted of robbery. Thereafter, a questionnaire was submitted to the jurors and ten replies were received. The results were as follows: (1) prior to the introduction of the lie-detector evidence, eight jurors would have voted for an acquittal, and two for conviction; (2) after the introduction of the exculpatory lie-detector evidence, the jurors' opinions were not changed; (3) six jurors stated that the lie-detector evidence was conclusive evidence of innocence; (4) five jurors stated that they were so impressed by the scientific value of the lie-detector that they accepted the evidence without question; (5) four jurors stated that in a subsequent case they would accept as conclusive the results of a lie-detector test; (6) *however*, all of the jurors who favored acquittal stated that the verdict was not based on the lie-detector evidence alone.¹⁰⁶

Superficially, the results in these two cases seem to lend some support to the fear of uncritical acceptance. However, the results cannot be analyzed in a vacuum. Consideration must be given to the testimony of the examiner. In each case, the examiner was well-qualified; indeed, he was noted in his field. In the *Kenny* case there was apparently un rebutted testimony that the device was 100 per cent accurate. Consequently, there was a basis for the jury to conclude that the conditions of reliability existed. If the only testimony supports the reliability of the results, why shouldn't the jury accept the results? It would seem that the jury in each case acted properly and in accordance with the testimony before it. However, whether a jury would similarly accept evidence of a lie-detector test in a case in which opposing counsel could demonstrate the absence of one or more of the conditions of reliability is conjectural. There is no reason to assume that it would. To the contrary, if the jury is properly instructed, there is reason to assume that it would not.

Courts refuse to take judicial notice of reliability.¹⁰⁷ The refusal is proper because reliability depends upon the facts of each case. Consequently, the efforts of counsel in proving or disproving reliability should be crucial. In most cases, it cannot be determined from the appellate opinions whether there was proof of reliability. However, with the single exception of the *Kenny* case, there is no indication that such proof would result in admissibility.¹⁰⁸ Indeed,

¹⁰⁶ Forkosch, "The Lie Detector and the Courts," 16 N.Y.U.L.Q. Rev. 202, 228 (1939).

¹⁰⁷ *Boeche v. State*, *supra* note 96; *People v. Forte*, 297 N.Y. 204, 18 N.E.2d 31 (1938).

¹⁰⁸ See, for example, *State v. Bohner*, *supra* note 94, in which a modest effort to prove reliability was unsuccessful.

as will hereinafter appear, there is reason for suggesting that the problem of admissibility has been resolved not on the basis of unreliability, but rather on the bases of (1) judicial hostility, (2) an undue attachment to the jury's rudimentary fact-finding methods, and (3) the stultifying maxim "nothing shall ever be done for the first time."

5. Reliability of Statements Made Under Narcosis.

a. *Some general observations.*

It has already been noted that the reliability of lie-detector results depends upon a number of variables. That the reliability of statements made under narcosis is a similarly complicated problem is clear from the following statement of the medical aspect of narco-analysis:

Formerly utilized as a form of biochemical therapy, [drugs] are presently employed to induce physiological alterations as a means for modifying behavior through verbal psycho-therapeutic efforts. Such drugs as scopolamine and the barbiturates (sodium pentothol and sodium amytal) have been administered in an effort to alter the metabolism of the central nervous system and the psychological adjustment of the patient. Since barbiturates are relatively non-toxic, and produce fewer unsatisfactory side effects than scopolamine, they have recently been used with greater frequency. They act as a central nervous system depressant, primarily on the cerebral cortex—the highest level of the nervous system—and on the diencephalon or "between-brain," and their pathways The particular type of behavior manifested under the influence of amytal is a complex resultant of the interaction of the personality of the subject, his specific physiological and bio-chemical reaction to it, and what is happening to him at that time.

Hypotheses concerning the mechanism of action of these drugs generally stress the diminution of fear and anxiety, the decreased "pressure upon the ego," the opportunity for abreaction, the process of talking about and "reliving" the foci of emotional disturbance.¹⁰⁹

Although suggestions have occasionally been made that fewer variables are present in the case of narcosis and that narco-induced statements are therefore more reliable than the results of lie-detector tests,¹¹⁰ such statements are of doubtful validity because they overlook the subtleties of the drug problem. Moreover, they obscure

¹⁰⁹ Dession, "Drug-Induced Revelation and Criminal Investigation," 62 Yale L.J. 313, 317 (1953).

¹¹⁰ See McCormick, "Deception Tests and the Law of Evidence," 15 Calif. L. Rev. 484, 493 (1927); Comment, "Admissibility of Confessions and Denials Made Under the Influence of Drugs," 52, Nw. U.L. Rev. 666, 671. n.27 (1957).

the point that reliability should be determined on a case-by-case basis rather than on the basis of a general exclusionary or inclusionary rule of evidence.

The story of the discovery of and the initial experience with drugs in aid of interrogation has already been told¹¹¹ and will not be considered herein. However, it is relevant to note that during the 1920's claims were made for the high reliability of statements induced by narcosis.¹¹² These general claims find little support today insofar as the admissibility of evidence is concerned.¹¹³ Although Dr. Huxtable testified in the *Nebb* case that statements made under narcosis are generally reliable, his testimony is at odds with the great weight of authority, both scientific and judicial. Consideration will first be given to the scientific authority.

b. *Scientific authority and the problem of reliability.*

The substantial weight of scientific opinion is that statements made under narcosis cannot generally be deemed reliable.¹¹⁴ The meaning of this assertion can be seen in the conclusion derived from certain experiments. In an experiment conducted at Yale University, it was stated that "'normal' individuals (*i.e.*, persons who perform adequately in their various functions, have good defenses and no highly pathological characteristics) are less likely to confess."¹¹⁵ The experimenters concluded:

¹¹¹ See Despres, "Legal Aspects of Drug-Induced Statements," 14 U. Chi. L. Rev. 601 (1947); Geis, "In Scopolamine Veritas," 50 J. Crim. L., C.&P.S. 347 (1959); Moenssens, "Narcoanalysis in Law Enforcement," 52 *Id.* 453 (1961); Muehlberger, "Interrogation Under Drug Influence," 42 *Id.* 513 (1951).

¹¹² See Despres, *supra* note 111, at 602; Geis, *supra* note 111, at 351-53.

¹¹³ For a lonely argument in favor of admissibility, see Comment, "Admissibility of Confessions and Denials Made Under Drugs," *supra* note 110, at 672-73. At 673 n. 37, the author suggests that courts, by emphasizing the value of a correct decision of innocence and the cost of an incorrect decision of guilt, might employ a double standard, admitting exculpatory statements and excluding inculpatory statements made under narcosis. A similar argument might be made regarding the lie-detector were it not for the opinion that most erroneous determinations favor the lying subject. See text to note 83, *supra*.

¹¹⁴ Statements of the authorities are collected in Dession, *supra* note 109, at 318-19; Despres, *supra* note 111, at 605; Geis, *supra* note 111, at 356; Macdonald, "Truth Serum," 46 J. Crim. L., C.&P.S. 259 (1955); Moenssens, "Narcoanalysis in Law Enforcement," 52 J. Crim. L., C.&P.S. 452 (1961); Muehlberger, *supra* note 111, at 518-23; Sheedy, "Narcointerrogation of a Criminal Suspect," 50 J. Crim. L., C.&P.S. 118 (1959); Note, "Some Problems Relating to the Admissibility of Drug Induced Confessions," 24 Brooklyn L. Rev. 96, 103-04 (1957). Statements of authorities in favor of reliability are collected in Comment, "Admissibility of Confessions and Denials Made Under Drugs," *supra* note 110, at 670 n. 23.

¹¹⁵ Dession, *supra* note 109, at 318.

. . . experimental and clinical findings indicate that only individuals who have conscious and unconscious reasons for doing so are inclined to confess and yield to interrogation under drug influence. On the other hand, some are able to withhold information and some, especially character neurotics, are able to lie.¹¹⁶

Similar conclusions were reached by experimenters at the University of Wisconsin:

. . . in general . . . the subjects who were resistant to suggestions in the normal state were also resistant when under the influence of the drug. There was a fairly marked tendency, however, for those who were susceptible in the normal state to be markedly more so when under the influence of scopolamine.¹¹⁷

Moreover, the authorities are in substantial agreement that persons under narcosis are highly suggestible and that neurotics under narcosis tend to substitute fantasy for truth.¹¹⁸ The aspect of suggestibility indicates the pitfall of the leading question. Although the matter is usually considered with reference to the inculpatory statement,¹¹⁹ it should also be considered with reference to the exculpatory statement as a factor complicating the reliability problem.

By way of summary, the following observation is pertinent:

Finally it is most important to realize that the conduct of the interrogation and the analysis of its verbal and behavioral content are exceedingly complex. The results can be evaluated properly only by trained and experienced experts who are aware of the manifold individual variations in response which occur.¹²⁰

As this quotation suggests, the determination of reliability of a narco-induced statement may rest upon the opinion of an expert that the statement is or is not reliable. This suggestion is, of course, similar to the suggestion already made regarding lie-detector results that reliability be determined on a case-by-case basis in accordance with testimony as to the criteria of reliability.

c. *The judicial approach to the problem of reliability.*

It has already been noted that courts, without exception, have held inadmissible exculpatory statements made under narcosis and

¹¹⁶ *Id.* at 319.

¹¹⁷ Hull, *Hypnosis and Suggestibility: An Experimental Approach* 99 (1933), quoted in Geis, *supra* note 111, at 356. In an experiment conducted in the early 1930's at the Northwestern University Scientific Crime Detection Laboratory involving controlled questions and subjects of high intelligence quotient, factual information was obtained in 75-85 per cent of the cases. The experiment is described in Muehlberger, *supra* note 111, at 515-18. In the author's opinion, departure from controlled conditions considerably lessens reliability. *Id.* at 518.

¹¹⁸ *Supra* notes 114-17.

¹¹⁹ See Muehlberger, *supra* note 111, at 516-17.

¹²⁰ Dession, *supra* note 109, at 319-20.

that a common ground for decision is unreliability. In some of the cases, the result is unquestionably correct because counsel apparently made no effort to prove reliability.¹²¹ But even in these cases, the result does not turn upon the absence of proof. Rather, the courts invoke a general rule of unreliability and indicate no awareness of the argument that a determination of reliability should be based upon the testimony of an expert regarding the presence or absence of the conditions of reliability in the particular case.¹²² Indeed, in an early case, the court blatantly characterized narco-induced statements as "clap-trap."¹²³ That a general rule of unreliability is applied is even more apparent from the few cases in which an abortive effort has been made to prove reliability. In *State v. Lindemuth*,¹²⁴ the defendant, charged with murder, offered to prove that he had made pre-trial, narco-induced, exculpatory statements to a psychiatrist. The psychiatrist testified that sodium pentothol would produce reliable statements and that this was generally recognized by practitioners of psychiatry. Another psychiatrist testified in rebuttal as to unreliability and stated that narco-induced statements were not generally regarded as reliable by psychiatrists. Insofar as the facts are disclosed in the appellate opinion, there was ample basis for the court to exclude the proffered evidence. The court could have held that the general assertion of reliability was contrary to the weight of scientific opinion. Or the court could have held that the general assertion of reliability was insufficient in that it did not focus upon the factors of reliability in the particular case. Instead, the court demanded the impossible: clear proof of general scientific opinion of reliability. In *Dugan v. Commonwealth*,¹²⁵ the court was slightly more incisive. The defense psychiatrist testified that he had previously achieved reliable results with narcosis. However, apparently he did not testify as to the conditions under which he narcotized the defendant and as to the existence of reliability factors in the defendant's case. His failure so to testify was one basis for the court's affirming the exclusion

¹²¹ *State v. Hudson*, 289 S.W. 920 (Mo. 1926); *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495, cert. denied, 342 U.S. 898 (1951); *Orange v. Commonwealth*, 191 Va. 423, 61 S.E.2d 267 (1950).

¹²² Even in the rare case in which there is some indication that the court is aware of the expert's role, the evidence is held inadmissible. In *People v. Cullen*, 37 Cal. 2d 614, 626-27, 234 P.2d 1, 8 (1951), it was stated:

And the offer of proof indicated that the statements to be produced would be hearsay, self-serving, and conjectural since the truth thereof would depend entirely on the psychiatrist's opinion which conceivably might conflict with the opinion of another psychiatrist.

¹²³ *State v. Hudson*, *supra* note 121, at 921.

¹²⁴ 56 N.M. 257, 243 P.2d 325 (1952).

¹²⁵ 333 S.W.2d 755 (Ky. 1960).

of the proffered evidence. But two other bases were also relied upon. The court found that there was no evidence of general scientific acceptance and that there was no evidence of the "certainty of truth"¹²⁶ of the defendant's statements. Again the court required the impossible.

If, in these two cases, the appellate opinions contain the entirety of the evidence proffered, defense counsel was partly at fault in failing to elicit testimony as to the reliability of the defendant's statements. But even with such testimony in the record there is every reason to suspect that the results would have remained the same and that the courts still would have relied upon an unrealistically high standard of reliability with reference both to the narco-induced statement in question ("certainty of truth") and to narco-induced statements in general (general scientific acceptance).

Thus, as in the case of the lie-detector, so also in the case of truth serum there is what is tantamount to a conclusive presumption against reliability.

6. Reliability of Statements Made Under Hypnosis.

a. *Some general observations.*

Thus far an effort has been made in this article (1) to explore the problem of reliability in the context of lie-detector and truth serum; (2) to isolate the factors or conditions of reliability; (3) to note *general* scientific attitudes or opinions regarding the reliability problem; (4) to note the blind and rigid judicial approach to the reliability problem; and (5) to suggest a treatment of the reliability problem in which emphasis is placed upon the presence or absence of reliability factors in a particular case rather than upon a requirement of general scientific acceptance. This effort has been made to furnish a basis for comparison in analyzing the reliability problem in the context of hypnosis and in predicting the probable judicial treatment of this problem. In this inquiry, consideration will first be given to the nature of hypnosis.

An early commentator has described the hypnosis as follows:

In its simpler manifestation it is a modified form of natural sleep, artificially induced, but in its more complex form it compares to the abnormal condition of natural sleep known as somnambulism.¹²⁷

However, hypnosis is not the same as sleep. The subject is aware; at the same time, he is in a state of increased suggestibility and

¹²⁶ 333 S.W.2d at 757.

¹²⁷ Sudduth, "Hypnotism and Crime," 13 *Medico-Legal J.* 239, 244 (1895).

he readily, and often uncritically, cooperates with the hypnotist.¹²⁸ Not all persons can be hypnotized. Although statements have been made that a large proportion of the population can be hypnotized,¹²⁹ the statements do not apply to young children, to adults incapable of prolonged attention,¹³⁰ or to persons with certain mental disorders.¹³¹ Thus, at the threshold of inquiry there is encountered the reliability factor of the subject. Another factor is to be found in the depth of the hypnotic state. There are various states or stages of hypnosis.¹³² Although the authorities do not agree on the number of stages,¹³³ there is agreement that suggestibility increases as depth increases.¹³⁴ Finally there is the factor of the hypnotist. It is not necessary that he be a psychiatrist, doctor of medicine, or psychologist. Many cases exist in which the hypnotist had a meager educational background and a relatively low intelligence quotient.¹³⁵ The background of the hypnotist would, however, be an important factor in evaluating his opinion of the reliability of statements induced by him. Moreover, it might also be an important factor in another aspect of the reliability problem, the relationship between hypnotist and subject. This relationship, influential upon the efficacy of hypnosis, comprehends the hypnotist's confidence in his own ability, the hypnotist's confidence in hypnosis as a device to achieve the desired result, the subject's attitude toward hypnosis, the subject's attitude as shaped by the circumstances of criminal interrogation, and the subject's understanding of what is expected of him.¹³⁶

b. *The scientific consensus regarding the problem of reliability.*

In the *Nebb* case, Dr. Huxtable testified generally that statements made under hypnosis are reliable.¹³⁷ He qualified his testi-

¹²⁸ 14 Encyclopedia Americana 604 (1950); 12 Encyclopedia Britannica 23 (1958); Allen, "Hypnotism and Its Legal Import," 12 Can. B. Rev. 14, 15 (1934); Note, "Hypnotism, Suggestibility & the Law," 31 Neb. L. Rev. 575, 576 (1952).

¹²⁹ Allen, *supra* note 128, at 16; Ladd, "Legal Aspects of Hypnotism," 11 Yale L.J. 173, 175 (1902).

¹³⁰ Ladd, *supra* note 129.

¹³¹ See text to notes 21 and 27, *supra*.

¹³² Note, "Hypnotism, Suggestibility and the Law," *supra* note 128, at 586-87.

¹³³ *Id.* at 587 n. 55.

¹³⁴ *Id.* at 586-87.

¹³⁵ The most notable recent example is the Danish case recounted in Reiter, *Antisocial or Criminal Acts and Hypnosis* (1958), in which the author takes the position that the subject was induced by hypnosis to commit robbery and murder. The hypnotist was an ex-convict and was of low intelligence.

¹³⁶ See Schneck, "Hypnosis in Psychiatry," in *Hypnosis in Modern Medicine* 143-44 (1959). Although Schneck's discussion relates to the efficacy of hypnosis as a psychotherapeutic tool, the factors enumerated would appear relevant to the problem of induced statements.

¹³⁷ See text to notes 20-27, *supra*.

mony somewhat by noting the reliability factors of subject and depth of hypnosis.¹³⁸ But, taken as a whole, his testimony was strongly in favor of reliability as a general proposition. In addition, he testified that Arthur Nebb was a good subject and he stated his opinion of the reliability of Nebb's pre-trial, hypno-induced statements.¹³⁹ Thus there was in the record testimony relating to reliability in general and testimony relating to the reliability of Nebb's statements in particular. The latter testimony cannot be assailed absent further investigation of Nebb and of the circumstances under which his statements were made. The former testimony, however, is not in harmony with the prevailing view. According to most medico-legal authorities, it cannot be said generally that hypno-induced statements are reliable.¹⁴⁰ In a treatise on medical hypnosis it is stated, "A guilty person, it would appear, is just as much likely to resist the truth under hypnosis as when he is in his normal state."¹⁴¹ And, in an early leading article on hypnosis, it was observed:

Now it is theoretically quite possible that the truth might sometimes, perhaps frequently, be obtained in this way. For the ancient motto, *in vino veritas*, applies very well to the hypnotic condition on making the necessary changes in the language. According to the more general features of the condition itself, the memory of what had occurred . . . would be more likely to revive and correctly to reproduce these occurrences . . . Moreover, as we have already seen, the loss of self-control is distinctive of this condition; and secrets, even when to divulge them would convict of punishable crime the person concerned, are very likely to be let slip when that person is in the hands of the skillful practitioner of hypnotism.

On the other hand, if there is a chance of getting truth, which he might otherwise be able and might very much wish to conceal, from the hypnotized as well as from the drunken man, there is also a very good chance of getting a large admixture of mistake and falsehood. For hypnotic subjects, like alcoholic subjects, can lie consciously; they even invent subtle webs of falsehood, as well as those who are in the normal state of waking. Indeed, in certain cases the disposition to prevaricate, and a certain low but effective form of animal cunning, are developed by the hypnosis itself; while an increased suggestibility for all kinds of illusions

¹³⁸ See text to notes 25-27, *supra*.

¹³⁹ See text to note 29, *supra*.

¹⁴⁰ Ambrose & Newbold, *Handbook of Medical Hypnosis* 23 (1958); Forel, *Hypnotism and Psychotherapy* 292-93 (1907); III Wigmore, *Evidence* §998, at 643 (3d ed. 1940); Allen, *supra* note 128, at 89-90; Bannister, "Hypnotic Influence in Criminal Cases," 51 *Albany L. Rev.* 87, 88 (1895); Ladd, *supra* note 129, at 179, 187-88. For collections of other authorities, see Note, "Hypnotism, Suggestibility and the Law," *supra* note 128, at 591; 42 *Harv. L. Rev.* 704 (1929).

¹⁴¹ Ambrose & Newbold, *op. cit.* *supra* note 140.

and hallucinations is as much an essential feature of the dream-life of hypnotic, as it is of normal sleep.¹⁴²

These opinions are buttressed by the conclusions of the noted psychiatrist Erickson who conducted many experiments with hypnotized subjects. He found that although hypnosis may in some instances be very effective in getting information from the subject, often the desire for self protection remains unaffected by hypnosis, and the subject may lie.¹⁴³

All of these views, representative of the medico-legal consensus, have particular relevance to the topic at hand, the admissibility of exculpatory statements. The defendant may be lying; his statements may have been suggested by unrecorded leading questions; there is no general acceptance of the reliability of hypno-induced statements.

Thus, although the few reported decisions of inadmissibility in cases of hypnosis are lacking in analysis, they can be supported by the reasoning of the lie-detector and truth serum cases. This reasoning, as already stated, is subject to question. If, in a case such as *Nebb*, there is unrebutted testimony by an expert that the conditions of reliability have been met and that the defendant's hypno-induced statements are reliable, why should such statements be excluded? Does the rudimentary (but traditional) method by which a jury attempts to assess credibility offer a greater likelihood of "truth" than the scientific method? Does the lay fact-finder possess an omniscience denied to the scientist? It is incredible that in a system purporting to be devoted to a search for the truth, expertise is ignored, indeed is rebuffed, by the imposition of standards which cannot now be (and, perhaps, can never be) met. A long second-look should be given to the requirement of general scientific acceptance of reliability.¹⁴⁴

¹⁴² Ladd, *supra* note 129, at 187-88.

¹⁴³ Erickson, "An Experimental Investigation of the Possible Anti-Social Uses of Hypnosis," 2 *Psychiatry* 391, 398-99, 404 (1939).

In the *Nebb* case, the defendant apparently lied under hypnosis. Regarding his statement to the Olivers, he testified initially that he said, "I got them both." Thereafter, he admitted that he said, "I ought to kill them both." p. 7, *supra*.

¹⁴⁴ In the discussion of the reliability problem as it relates to narco-induced and hypno-induced statements, reference has not been made to the argument that such statements would have too great an impact upon the jury, that is, that the jury would accept them uncritically. This argument was considered in connection with the discussion of lie-detectors. However, a difference should be noted between the lie-detector situation, on the one hand, and the narcosis and hypnosis situations, on the other hand. In the former, there is little likelihood of a demonstration being conducted in the courtroom. Privacy is one of the requisites of an interrogation by lie-detector. Inbau, *Lie Detection & Criminal Interrogation* 9 (3d ed. 1953). In the latter, there is a greater likelihood at least of a proffered intra-judicial demonstration. Arguably, such

Suppose, however, that this general requirement were relaxed and that, insofar as reliability is concerned, it would be sufficient, as suggested in this article, for the defendant to prove by expert testimony the reliability of his statements in particular. Further, put to one side, for the moment, the possibility of any other basis for objection (e.g., the hearsay rule).¹⁴⁵ A rule of admissibility is thereby created. How should the rule operate?

c. *The mechanics of a suggested rule of admissibility.*

At the outset, a distinction should be noted between (1) the testimony of the expert relating to reliability, and (2) the testimony, presumably of the expert, that the defendant made extra-judicial, exculpatory statements. The initial question concerns the relevance of each type of testimony. Clearly, the testimony relating to reliability is relevant as a foundation for admissibility of the exculpatory statements. Just as clearly, it is relevant to the credibility of, or the weight to be accorded to, the exculpatory statements. However, it is not directly relevant on the merits. That is, it should not be considered as evidence that the incident occurred as the defendant claims it did. On the other hand, a different rule should apply to the testimony that extra-judicial, exculpatory statements were made by the defendant. This testimony is relevant to the credibility of any *intra-judicial*, exculpatory statement made by the defendant. It is *also* relevant on the merits. That is, it should be considered as evidence of the facts asserted in the exculpatory statement (remember that the hearsay rule has been put aside for purposes of this immediate discussion).

The question of relevancy having been answered, consideration will now be given to the operation of the suggested rule of admissibility. Suppose that *D*, charged with murder, claims that he was the victim of an unprovoked, violent attack by the deceased, and that he killed in self defense. Two disinterested eyewitnesses, however, state that *D* was the aggressor. Prior to trial, *D*'s attorney decides that *D* should be interrogated under hypnosis, he obtains the cooperation of a reputable medical hypnotist, and arrangements are made for the interrogation. At this point, *and as a condition of admissibility*, should the prosecutor be given notice and an oppor-

a demonstration might aggravate the problem of impact. Empirical evidence is lacking. However, several persons who attended the *Nebb* trial told me that the hypno-induced testimony had great impact upon them. Does this suggest that a higher standard of reliability be required in the case of an intra-judicial interrogation than might be required in the case of testimony regarding an extra-judicial interrogation? I would answer the question in the negative absent *evidence* of uncritical acceptance.

¹⁴⁵ Other bases for objection are considered *infra* at pp. 39-40.

tunity to participate in the interrogation?¹⁴⁶ The consequences of a negative answer will depend upon the content of the hypno-induced statement. If the statement turns out to be *inculpatory*, the prosecutor's want of knowledge preserves whatever values may be thought to exist in the "sporting theory" of criminal law, the defendant is not put in the position of aiding the prosecution's case, and he is given an opportunity (which assuredly he will use) to suppress evidence adverse to him. If the statement happens to be *exculpatory*, the prosecutor's absence deprives the state of the chance to rebut the expert's testimony regarding the criteria of reliability and to rebut his opinion in favor of reliability. Although rebuttal could be attempted by means of a hypothetical question addressed to the state's expert and embracing the facts testified to by the defense's expert, such an approach is not wholly satisfactory because it pits the testimony of the expert who was present and who testifies on the basis of observation against the testimony of the expert who was absent and who testifies on the basis of hypothesis.

Is there any affirmative reason why the state should be prohibited from participating in the initial interrogation? An answer might be attempted in terms of the privilege against self-incrimination (not unrelated to the "sporting theory" of criminal law).¹⁴⁷ However, in such an answer consideration cannot be given to the inculpatory-exculpatory dichotomy referred to above for the reason that the problem arises in point of time immediately before the *initial interrogation* under hypnosis at which point it is not known whether the statement will be inculpatory or exculpatory or, indeed, whether the conditions of reliability, hence admissibility, exist. Thus the privilege issue can be stated as follows: is the privilege against self-incrimination violated if, as a condition upon the *possible* admissibility of an exculpatory statement, the defendant must take the *risk* of a possibly admissible, incriminatory statement? If the question is complicated, the answer is even more complicated because it depends upon a choice of law. If the case arises in a state court, both state and federal (fourteenth amendment) questions are present; if the case arises in a federal court, a fifth amendment question is presented.

The fourteenth amendment question is resolvable against the defendant on the basis of the decisions in *Twining v. New Jersey*¹⁴⁸

¹⁴⁶ If defendant is incarcerated, the prosecution will in most cases receive notice from the director of the confinement facility. The problem then is limited to opportunity to participate.

¹⁴⁷ See McNaughton, "The Privilege Against Self-Incrimination," 51 J. Crim. L., C. & P. S. 139 (1960).

¹⁴⁸ 211 U.S. 78 (1908).

and *Adamson v. California*.¹⁴⁹ In these cases the Court held that (1) the fifth amendment is not made operative upon the states by the fourteenth amendment, (2) the privilege against self-incrimination is not within the "privileges or immunities" clause of the fourteenth amendment; and (3) the impairment of the privilege is not fundamentally unfair within the due process clause of the fourteenth amendment. Whether these cases will retain their vitality is conjectural,¹⁵⁰ and neither *Mapp v. Ohio*¹⁵¹ nor the recent change in the membership of the Court is an irrelevant consideration. But for the present these cases do exist and they afford a ready solution to the fourteenth amendment question.

A more difficult question is presented by the fifth amendment and by parallel state constitutional provisions. Clearly the proceeding is criminal, the defendant is a person to whom the privilege attaches, and the utterance is testimonial. This much can be said under either state or federal provisions. But does the utterance tend to incriminate? The question is a monstrous one because it must be asked before anyone knows the content of the utterance. Not even the subject knows what he will say under the influence of hypnosis! This dilemma, it might be argued, is good because it will deter a guilty subject from attempting to lie. But, on the other hand, it may well deter an innocent subject from taking the risk of making false, incriminatory statements.¹⁵² Quite probably the risk can be diminished if the hypnotist is a psychiatrist and properly evaluates the subject. But the evaluation, by hypothesis, excludes consideration of the utterances and is, therefore, of diminished utility. Consequently the situation remains one of doubt.

In view of these considerations, there would seem to be sufficient risk of incrimination to warrant the conclusion that the

¹⁴⁹ 332 U.S. 46 (1947).

¹⁵⁰ See Sowle, "The Privilege Against Self-Incrimination: Principles and Trends," 51 J. Crim. L., C.&P.S. 131, 132 (1960). There is reason to believe that the issue is ripe for reconsideration. The Supreme Court recently granted certiorari in a state self-incrimination case. *Malloy v. Hogan*,—Conn.—, 187 A.2d 744 (1963), *cert. granted*, 31 U.S.L. Week 3395 (U.S. June 3, 1963) (No. 1031).

For another aspect of the fourteenth amendment problem, the conditioning of state employment upon exercise or waiver of the privilege, compare *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960), and *Lerner v. Casey*, 357 U.S. 468 (1958), and *Beilan v. Board of Education*, 357 U.S. 399 (1958), and *Adler v. Board of Education*, 342 U.S. 485 (1952), and *Garner v. Los Angeles Board*, 341 U.S. 716 (1951), with *Slochower v. Board of Education*, 350 U.S. 551 (1956), and *Wiemann v. Updegraff*, 344 U.S. 183 (1952).

¹⁵¹ 367 U.S. 643 (1961) (state prohibited by fourteenth amendment from using illegally obtained evidence).

¹⁵² It does not suffice to argue that such statements are by definition unreliable and therefore inadmissible. What the subject wants to avoid is the risk of an erroneous decision that the evidence is admissible.

utterance may tend to incriminate within the meaning of the privilege. As stated in *Hoffman v. United States*:

However, if the witness, upon interposing his claim, were required to prove the hazard [of incrimination] in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered *might be dangerous because injurious disclosure could result*.¹⁵³ (Emphasis added.)

It is true that *Hoffman* involved a refusal to answer questions at a grand jury hearing and that the case is therefore factually distinguishable from the hypothetical case under consideration. However, the rationale of *Hoffman*, epitomized by such words as "might" and "could," is applicable. Moreover, in the hypothetical case there is absent the question of whether the tendency to incriminate is asserted in good faith. If the subject cannot know the effect upon his answers of hypnosis (or narcosis) it can hardly be said that bad faith exists in his reluctance to make a public disclosure.

The only question remaining, then, is whether there is compulsion. Compulsion by means of physical force is absent from this case. Also absent is compulsion by means of judicial decree enforceable through contempt proceedings. What is present is a form of indirect compulsion inherent in the dilemma referred to above. Does such indirect compulsion violate the federal and state provisions against self-incrimination? From an historical standpoint, the answer is no. The privilege was designed to guard against inquisitorial practices attended by direct compulsion.¹⁵⁴ Indeed, the privilege was the creature of a system in which the accused was not competent to testify, and so it has been argued that indirect compulsion, the effect of which is to force the accused to testify, is not a violation of the privilege.¹⁵⁵ But the historical argument is not an end-all. As Mr. Justice Brandeis observed in his dissenting opinion in the wire-tapping case of *Olmstead v. United States*:

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken," had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination

¹⁵³ 341 U.S. 479, 486-87 (1951). See also *Curcio v. United States*, 354 U.S. 118, 121 (1957).

¹⁵⁴ Note, "Comment on Defendant's Failure to Take the Stand," 57 Yale L.J. 145, 150 (1947); 22 Cornell L.Q. 392, 394 (1937); 50 Harv. L. Rev. 356, 357 (1936).

¹⁵⁵ Bruce, "The Right to Comment on the Failure of the Defendant to Testify," 31 Mich. L. Rev. 226 (1932). See also articles cited in note 154, *supra*.

But "time works changes, brings into existence new conditions and purposes." . . .

Moreover, "in the application of a constitution, our contemplation cannot be only of what has been but of what may be."¹⁵⁶

Although this observation may serve to neutralize the historical argument, it does not answer the question. Certainly it does not compel the conclusion that the privilege is violated in the case under consideration. Nor is that conclusion compelled by recent federal cases. In *Orloff v. Willoughby*,¹⁵⁷ the petitioner, a psychiatrist, refused to divulge information requested in connection with his application for a military commission. He was then drafted, was assigned to "low-level" medical duties, and sought release by a petition for a writ of habeas corpus. As his case progressed through the federal judicial hierarchy, he claimed variously that (1) he was entitled to discharge, (2) he was entitled to a commission, and (3) he was entitled to perform the gamut of psychiatric functions. These claims were rejected by a divided Court. Mr. Justice Jackson, writing for the majority, stated:

It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertion by Communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on that ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question "No."¹⁵⁸

Implicit in this quotation is the premise that the indirect compulsion present in *Orloff* was not a punishment for exercise of the privilege and was not, therefore, prohibited by the privilege.

In *Kim v. Rosenberg*,¹⁵⁹ a deportation statute was interpreted as placing upon the petitioner the burden of disproving Communist affiliation. The petitioner claimed privilege and refused to give information on this point. The Court affirmed the order of deportation in an opinion in which the question of indirect compulsion was not even alluded to.

In *Kaufman v. Hurwitz*,¹⁶⁰ the appellant was denied a discharge in bankruptcy pursuant to a statute which conditioned discharge upon a satisfactory explanation for lost assets. Appellant

¹⁵⁶ 277 U.S. 438, 473-74 (1928).

¹⁵⁷ 354 U.S. 83 (1953).

¹⁵⁸ *Id.* at 91.

¹⁵⁹ 363 U.S. 405 (1960).

¹⁶⁰ 176 F.2d 210 (4th Cir. 1949).

had claimed privilege and refused to explain. In affirming the trial court's decision, the court of appeals specifically referred to the dilemma of indirect compulsion through denial of discharge. However, it held that the legislature could impose upon the privilege of discharge the condition of disclosure.

These cases, by no means exhaustive of federal decisions,¹⁶¹ are, of course, factually distinguishable from the problem case. Yet each of these cases supports the theory that the exercise of a privilege or benefit (military commission, residence in the United States, discharge in bankruptcy) can be conditioned so as to place upon the defendant the risk of incrimination, and that the condition is not constitutionally invalid. Thus, these federal cases and related state cases¹⁶² indicate the difficulty of asserting, under current law, that there is, in the problem case, an impermissible compulsion. Compulsion there is; but it takes the form of a condition (the prosecutor's participation in the initial interrogation) upon that which is hardly a natural right and which fairly can be labelled a privilege or benefit (the admissibility of a particular type of evidence).¹⁶³ Therefore, in the problem case the conclusion is that the privilege against self-incrimination is not violated.¹⁶⁴

¹⁶¹ An approach in favor of the privilege against self-incrimination is suggested in *Steinberg v. United States*, 163 F. Supp. 590 (Ct. Cl. 1958). There, the court declared unconstitutional (unreasonable classification; bill of attainder) a statute which wrested retirement benefits from federal employees who claimed the privilege against self-incrimination. For comments in favor of the *Steinberg* result, see 47 Geo. L.J. 597 (1959); 107 U. Pa. L. Rev. 880 (1959); 44 Va. L. Rev. 1330 (1958). For a dissenting view, see 27 Geo. Wash. L. Rev. 382 (1959).

¹⁶² State cases are collected in VIII Wigmore, Evidence §2272, at 441-44 (McNaughton rev. 1961).

¹⁶³ To be distinguished from the problem case are the two cases in which state courts have declared unconstitutional statutes authorizing the prosecutor to comment upon the failure of the accused to testify in his own behalf. In re Opinion of the Justices, 300 Mass. 620, 15 N.E. 2d 662 (1938); *State v. Wolfe*, 64 S.D. 178, 266 N.W. 116 (1936). The inarticulate premise of these cases is that the threat of the prosecutor's comment operates to compel the defendant to testify. The premise is probably correct. See Note, "Comment on Defendant's Failure to Take the Stand," *supra* note 154, at 149 n. 21. However, these cases do not involve indirect compulsion in the form of a condition attached to a "benefit." Nor do the opinions purport to proscribe all forms of indirect compulsion.

More to the point are two cases in which the prosecutor's comment was held not to violate the privilege against self-incrimination. *State v. Bartlett*, 55 Me. 200 (1867); *State v. Baker*, 115 Vt. 94, 53 A.2d 53 (1947). If the prosecutor's comment is not in violation of the privilege, one may argue, *a fortiori*, that the rule applies to indirect compulsion in the form of a conditional benefit.

Also to the point are statutes prohibiting comment by the prosecutor. These statutes have been used as the basis for an argument that the constitutional provisions against self-incrimination were given a contemporaneous legislative interpretation as not barring comment by the prosecutor. Bruce, *supra* note 155, at 233-34.

¹⁶⁴ Compare with the above problem and suggested solution the problem of the

However, this conclusion only removes a constitutional objection. It does not serve to answer the question whether, from the standpoint of wise policy, the prosecutor should be given an opportunity to participate in the initial interrogation. Some aspects of this question have already been considered,¹⁶⁵ and it must be evident that a dogmatic answer is impossible. Only two dogmas are available: the dogma of truth and the dogma of the values of the adversary system. The former is desirable; the latter is established, particularly in criminal law. A rule permitting the prosecutor to participate in the initial interrogation would represent a substantial erosion of the adversary system, perhaps to such an extent that it would be unacceptable to many lawyers, judges, and law-trained legislators. Moreover, the rule might operate to deter an accused from using one of the techniques under consideration. On the other hand, if the prosecutor had no access *at all* to the accused, the rule would be unfair to the state. Between these extremes lies a middle ground. Permit the accused a private, initial interrogation. If the result is inculpatory, let his attorney handle the matter as he would handle any other type of inculpatory information uncovered during the course of investigation.¹⁶⁶ If the result is exculpatory, require, as a condition of admissibility, that the prosecutor be given access to the defendant's expert and that the prosecutor be given an opportunity to interrogate the defendant with the assistance of the prosecution's own expert. Within the suggested procedure is to be found the prevailing adjustment between full disclosure and adversary values. Consequently, the suggestion should not arouse great criticism from those who are steeped in the tradition of advocacy.¹⁶⁷ To a certain extent however, the search for truth is

defendant who may be deterred from testifying in his own behalf by the threat of a vigorous cross-examination. This threat comprehends impeachment by (1) contradictory statements made during cross-examination, (2) prior inconsistent statements, and (3) prior convictions. However, the defendant is not permitted to play both ends against the middle. If he wants to avoid the threat, he must refrain from testifying. If he wants the benefits of a direct-examination, he must take the risk of a detrimental cross-examination.

¹⁶⁵ See text between notes 146 and 147, *supra*; see text to note 152, *supra*.

¹⁶⁶ The inculpatory statements should, therefore, be protected from disclosure by the expert to the prosecutor. Protection might be based on the attorney-client privilege. See McCormick, Evidence §100 (1954).

¹⁶⁷ There is nothing novel in the requirement of notice to the prosecution. In Ohio, for example, the defendant is required by statute to give notice to the prosecution if the defense of alibi is to be raised. Notice must be given not less than three days before trial and must "... include specific information as to the place at which the defendant claims to have been at the time of the alleged offense." Ohio Rev. Code §2945.58. If the defendant fails to give notice the court may exclude evidence in support of the defense. *Id.* For a more complete discussion of the alibi problem and the parallel problem of the special plea of insanity, see Paulsen & Kadish, Criminal Law

frustrated. Yet the frustration need not be of substantial practical importance. The teaching of past experience is that hypnosis and related techniques are used primarily in cases in which the evidence strongly favors the state and in which the defense is predicated almost entirely upon the testimony of the defendant. In such cases there does not appear to be a significant risk that the trier of fact will, because of the withholding of an incriminatory statement, erroneously determine that the defendant is innocent. For all of these reasons, therefore, the suggestion is made herein that the prosecutor be permitted a "second stage" interrogation.¹⁶⁸

Returning to the problem case, suppose that the initial interrogation is conducted by *D*'s attorney under the supervision of a qualified medical hypnotist; that under hypnosis *D* maintains that he was the victim of an unprovoked and violent attack; that the expert is satisfied that the conditions of reliability are present; and that he is willing to state his opinion in court. Suppose, further, that notice is given to the prosecutor; that he interrogates the expert; and that he interrogates *D* under the supervision of a qualified medical hypnotist for the state. Of what judicial significance is the second interrogation? The answer to this question should depend upon the results of the second interrogation measured by the opinion of the state's expert.

D inculcates self; expert opinion: unreliable. In this situation, the inculpatory statements should not be admitted as evidence of guilt. Whether the fact of inculcation and the opinion of unreliability should be admitted will depend upon whether they are relevant in the cross-examination of *D*'s expert. The effect of cross-examination will be considered later.

and its Processes 1016 (1962). In *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919 (1962), the California Supreme Court held that the state constitutional provision against self-incrimination was not violated by an order directing the defendant in a rape case to disclose to the prosecution the evidence in support of a claim of impotency. The case is discussed in Comment, "The Self-Incrimination Privilege: Barrier to Criminal Discovery?," 51 Calif. L. Rev. 135 (1963); 61 Mich. L. Rev. 987 (1963); 15 Stan. L. Rev. 700 (1963).

¹⁶⁸ This suggestion is a rejection of another approach: the appointment of a panel of expert witnesses. The suggestion also serves to eliminate as a basis for inadmissibility the argument that the defendant derives an unfair advantage from an extra-judicial statement because he is not subjected to cross-examination. See *State v. Lindemuth*, 56 N.M. 257, 243 P.2d 325 (1952) (truth serum); *State v. Bohner*, 210 Wis. 651, 246 N.W. 314 (1933). Should it be argued that the prosecutor is still at a disadvantage because he has no assurance that the defendant will testify at the trial, the answer is this: (1) treat the offered extra-judicial, exculpatory statement as a waiver of the defendant's right not to testify; or (2) permit the prosecutor to impeach the credibility of the extra-judicial statement by any means permissible for the impeachment of an intra-judicial statement.

D inculpatates self; expert opinion: reliable. In this situation, if the proper foundation is established, both the inculpatory statement and the exculpatory statement should be admitted on the merits. In addition, each statement and the attending opinion should be considered in the cross-examination of each expert.

D exculpates self; expert opinion: unreliable. In this situation, the second exculpatory statement should not be admitted on the merits as corroborating the first exculpatory statement. However, the opinion of unreliability should be considered in the cross-examination of *D's* expert.

D exculpates self; expert opinion: reliable. In this situation, the second exculpatory statement should be admitted on the merits, assuming the proper foundation testimony. In addition, each statement and expert's opinion should be admitted as corroborating the other statement and opinion.

From the statement of these problems and proposed solutions, it is apparent that several questions remain. First, what minimum qualifications should the expert have? In a case involving hypnosis, the expert should be a doctor of medicine, and, because the validity of his opinion will depend in substantial part upon his evaluation of the subject, he should either be a practicing psychiatrist or have such a practice as requires frequent psychiatric judgments. In addition, he should frequently use the techniques of hypnosis in his practice. These requirements should also prevail in cases of narcosis. Regarding the lie-detector, the expert, in addition to possessing expertise in the use of the polygraph, should, at a minimum, be a practicing clinical psychologist. The judgments which the expert is called upon to make are sufficiently complicated to warrant this requirement in spite of the fact that the requirement will make inadmissible the results of a lie-detector examination administered typically by a police officer.

Secondly, what should be the minimum content of the expert's testimony for purposes of establishing a foundation? At the outset the expert should state the conditions of reliability and the factors which impair reliability. Then, he should relate these general statements to the facts of the case at hand. Finally, he should give an affirmative answer to a question phrased somewhat as follows: "Consider the following: (1) your knowledge of and experience with hypnosis; (2) your participation in an interrogation of the defendant while he was under hypnosis induced by you; (3) your knowledge of the conditions of reliability of hypno-induced statements; (4) the presence or absence of any of these conditions during the interrogation of the defendant; and (5) the statements made by the defendant while under hypnosis. Having considered

these factors, would you accept the defendant's hypno-induced statements, along with other evidence, as a basis for making an informed and intelligent judgment?"

Thirdly, how should a determination regarding admissibility be made in a case in which there is conflicting evidence of reliability? Initially, the defendant's expert should be examined and cross-examined in the absence of the jury. Assume that he gives an affirmative answer to the question above and that he adheres to the answer on cross-examination. Assume, further, that the prosecution's expert gives contradictory testimony, also in the absence of the jury. The only question, then, is whether the defendant has *prima facie* established reliability. The answer is that he has, and that the judge must rule in favor of admissibility. Cross-examination of the defendant's expert, not resulting in abandonment of his opinion, and contradictory testimony of the prosecution's expert should relate to weight rather than admissibility. Once admissibility is determined, the testimony should be given again, this time in the presence of the jury. In addition, the jury should receive the statements made by the defendant.

This procedure is, of course, open to the complaint that it fosters a battle of the experts. But what of it? The battle should be fought on the field of expertise rather than on the field of guesswork. The question whether the jury will be able to comprehend the testimony of the experts cannot be answered with assurance. But if there is difficulty in comprehension, the fault lies not in the subject matter and not with the experts. It lies, rather, with lawyers who prefer to demonstrate a smattering of ignorance by using technical terms in examination instead of conducting a well-prepared examination which takes into account the difficulties of communication. These difficulties are not insuperable and should not be a basis for the rejection of evidence. The hoary cries, "battle of the experts" and "incomprehensible," found in the lie-detector and truth serum cases¹⁶⁹ should be recognized as makeweights rather than reasons. It is true that the jury may be confronted with conflicting expert testimony and that the matter may be difficult for the jury to resolve, but that problem is an inherent part of the decision-making process. It is hardly a reason for the exclusion of evidence. It, too, is a makeweight.

Also a makeweight is the argument that expert testimony will usurp the jury's fact-finding function.¹⁷⁰ This argument, embracing a tacit assumption that the jury will understand the experts' testi-

¹⁶⁹ See, for example, *People v. Cullen*, 37 Cal. 2d 614, 234 P.2d (1951) (truth serum); *State v. Lindemuth*, *supra* note 168; *State v. Bohner*, *supra* note 168. See also, *Inbau*, *op. cit. supra* note 144, at 129-30.

¹⁷⁰ See *Dugan v. Commonwealth*, 333 S.W.2d 755, 758 (Ky. 1960) (truth

mony, is singularly at odds with the argument, discussed above, that the jury will not understand the testimony. Moreover, the argument is deceiving. "Usurp" is a nasty word; it connotes a forceful and illegitimate ouster. It conjures up visions of an expert witness grabbing a juror by the scruff of the neck and demanding that the juror decide the case as the expert would decide it. But, to the contrary, the expert is just another witness. As the lay witness testifies to his observation and at times expresses his opinion on matters involving no special expertise, so the expert witness testifies to his observation and expresses his opinion on matters of special expertise. If the expert's testimony is contradicted, the jury must resolve a difficult problem of credibility. This is hardly usurpation. And if the expert's testimony is uncontradicted, why shouldn't the jury accept it as a guide to decision as it would the testimony of any credible lay witness?

Earlier in this discussion, the reader was asked to assume that the reliability problem was the only stumbling-block on the road to admissibility. With the reliability problem put to one side, it is now appropriate to discuss two other bases for objection: (1) that the extra-judicial statement is self-serving; and (2) that the statement is hearsay.¹⁷¹ That the statement is self-serving is true; were it otherwise the defendant would not offer it into evidence. But that the label "self-serving" warrants rejecting the evidence is another matter. Assuredly the reason does not apply to intra-judicial, exculpatory statements. If it did, the law of evidence would have retrogressed to that unfelicitous time when the defendant was incompetent to testify in his own behalf.¹⁷² Regarding extra-judicial statements, it must be admitted that, although some courts have rejected the "self-serving" rule, others have not.¹⁷³ The wise course, however, has been charted by Professor McCormick: "Actually the

serum); Forkosch, "The Lie Detector and the Courts," 16 N.Y.U.L.Q. Rev. 202, 221 (1939).

¹⁷¹ These arguments are found in *Lindsey v. United States*, 237 F.2d 893 (9th Cir. 1956) (dictum) (truth serum; self-serving); *People v. Cullen*, *supra* note 169 (truth serum; self-serving, hearsay); *People v. McNichol*, 100 Cal. App. 2d 544, 234 P.2d 21 (1950) (same); *Dugan v. Commonwealth*, *supra* note 170 (same); *State v. Hudson*, 289 S.W. 920 (Mo. 1926) (truth serum; self-serving); *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949) (lie-detector; impairment of cross-examination); *State v. Lindemuth*, *supra* note 168 (truth serum; self-serving, hearsay); *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495, *cert. denied*, 342 U.S. 898 (1951) (lie-detector; truth serum; impairment of cross-examination); *Orange v. Commonwealth*, 191 Va. 423, 61 S.E.2d 267 (1950) (truth serum; self-serving). It should be noted that the hearsay argument will have but limited application to an intra-judicial statement.

¹⁷² For the view that the "self-serving" rule was an adjunct of the defendant's incompetency, see McCormick, *Evidence* §275, at 588 (1954).

¹⁷³ See *id.* at 589 for a collection of the cases.

appropriate rule for the exclusion of a party's declarations offered in his own behalf as evidence of the truth of the facts declared is the hearsay rule."¹⁷⁴ And it is to the hearsay rule that consideration will now be given. Four arguments are generally urged in support of the exclusion of hearsay statements: (1) the statements are not attended by the solemnity of an oath; (2) the fact-finder is unable to observe the demeanor of the out-of-court declarant; (3) the witness may not accurately report the out-of-court declaration; and (4) there is no opportunity to cross-examine the declarant.¹⁷⁵ Reduced to a common denominator, the problem is one of assumed unreliability. Indeed, the various exceptions to the hearsay rule derive from the counter-assumption of reliability.¹⁷⁶ And it is this same counter-assumption which underlies the argument in favor of the admissibility of hypno-induced and related statements. Once the proper foundation is established, in accordance with the procedure outlined in this article, the reasons in support of the hearsay rule vanish. Consequently the hearsay rule should not be a bar to admissibility.¹⁷⁷

D. *Admissibility, Over Objection, of Inculpatory Statements Under Hypnosis.*

Suppose that *D* is arrested and charged with murder. A preliminary hearing results in his being bound over for indictment by grand jury. Bail is denied and *D* is confined. During confinement, *D* is interrogated by agents of the state while under hypnosis induced by an expert medical hypnotist, and inculpatory statements are obtained. Are these statements admissible in evidence? If not, should they be? The answers to these questions will depend in part upon whether the statements are voluntary or involuntary.

1. Voluntary, Inculpatory Statements.

No American cases have been found involving the admissibility of statements made under hypnosis or narcosis voluntarily undergone.¹⁷⁸ However, lie-detector cases are available, and, as might be

¹⁷⁴ *Ibid.* (footnotes omitted). For another rejection of the "self-serving" rule, see Dession, "Drug-Induced Revelation and Criminal Investigation," 62 Yale L.J. 313, 323 (1953).

¹⁷⁵ McCormick, *op. cit. supra* note 172, §224; Wigmore, Science of Judicial Proof §214, at 426-27 (3rd ed. 1937).

¹⁷⁶ Dession, *supra* note 174, at 325.

¹⁷⁷ *Ibid.*

¹⁷⁸ The French case of Gabrielle Bombard has already been commented upon. See text to note 7, *supra*.

This discussion of voluntary statements will exclude case in which the defendant confessed while intoxicated or while under the influence of drugs not considered to be truth sera. For discussions of these cases, see Note, "Some Problems Relating to

expected, the rule is one of inadmissibility. Although the rule has been applied to grand jury proceedings,¹⁷⁹ the typical application of the rule is at trial. If the trial court admits the results of a lie-detector test as evidence of guilt, there is reversible error.¹⁸⁰ There is also reversible error if a prosecution witness testifies that the defendant took a lie-detector test, even though the results are not specifically disclosed to the jury.¹⁸¹ The theory of these cases is that

the Admissibility of Drug Influenced Confessions," 24 Brooklyn L. Rev. 96 (1957); Comment, "Admissibility of Confessions and Denials Made Under the Influence of Drugs," 52 Nw. U.L. Rev. 666 (1957). For a case in which a truth serum was treated as an ordinary drug and a resulting confession was held reliable, voluntary, and admissible, see *People v. Townsend*, 11 Ill. 2d 30, 141 N.E.2d 729, *cert. denied*, 355 U.S. 850 (1957). The case is discussed in Sheedy, "Narcointerrogation of a Criminal Suspect," 50 J. Crim. L., C&P.S. 118 (1959). For the habeas corpus sequel to *People v. Townsend*, see *Townsend v. Sain*, 83 S.Ct. 745 (1963), discussed *infra* note 209.

¹⁷⁹ *People v. Dobler*, 215 N.Y.S.2d 313 (Suffolk Co. Ct. 1961). In the *Dobler* case, an indictment was dismissed because of testimony before the grand jury that the accused had taken a lie-detector test and had been informed that the results were not favorable. It was noted that under New York law a grand jury may receive only legally admissible evidence.

¹⁸⁰ *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947); *State v. Trimble*, 68 N.M. 406, 362 P.2d 788 (1961). In *People v. Wochnick*, 98 Cal. App. 2d 124, 219 P.2d 70 (1950), the examiner testified over objection that the defendant reacted to the murder weapon, that the defendant was then asked for an explanation, and that he said that he was unable to give an explanation. The trial court instructed the jury to disregard the evidence that the defendant reacted to the murder weapon. On appeal the conviction was reversed because of the lie-detector evidence. No weight was given to the instruction.

¹⁸¹ *People v. Carter*, 48 Cal. 2d 737, 312 P.2d 665 (1957) (*X*, a suspect, testified that he submitted to a lie-detector examination and intimated that *D* refused; *X*'s testimony was thereafter stricken; court still found that reversible error had been committed); *People v. Welke*, 342 Mich. 164, 68 N.W.2d 759 (1955) (examiner testified that *D* took test and was thereafter told that he was lying); *State v. Arnwine*, 67 N.J. Super. 483, 171 A.2d 124 (1961) (examiner testified that defendant took test, that defendant was advised of the results, and that defendant then confessed); *State v. Varos*, 69 N.M. 19, 363 P.2d 629 (1961) (examiner testified that defendant took test, that defendant then confessed, and that he (the examiner) had never been proved wrong; conviction reversed even though defendant's attorney failed to object); *State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961) (testimony indicated that defendant and co-defendant took test and that co-defendant passed); *State v. Smith*, 113 Ohio App. 461, 178 N.E.2d 605 (1960) (prosecution witness testified that defendant took test but that defendant did not know the results); *Leeks v. State*, 245 P.2d 764 (Okla. Crim. App. 1952) (opinion does not disclose the substance of the testimony). *Contra*, *People v. Schiers*, 160 Cal. App. 2d 364, 324 P.2d 981, *hearing denied, per curiam*, 329 P.2d 1 (1958) (witness testified unresponsively that defendant took test, was told he was lying, was asked for an explanation, and stated that the lie-detector was wrong; trial court instructed jury to disregard; court of appeals held error cured by instruction; Judges Carter, Schauer, and Traynor vigorously dissented from supreme court's refusal to grant hearing).

the witness indirectly told the jury that the results were unfavorable to the defendant. However, a peculiar problem exists in cases in which the lie-detector test precedes a confession. In such cases the prosecutor's dilemma is obvious: on the one hand, he may be required to prove that the confession was voluntary; on the other hand, he runs the risk of reversible error if, in proving the circumstances surrounding the confession, he suggests that the lie-detector test indicated guilt. And the risk is a real one, at least in those cases in which the evidence is received without an instruction that the evidence be considered only on the question of voluntariness.¹⁸² But if the instruction is given, the cases generally hold that reversible error has not been committed,¹⁸³ and it may be inferred from one case that the instruction is not even necessary.¹⁸⁴ Confession cases aside, however, the general rule is still one of inadmissibility.

¹⁸² *People v. Welke*, *supra* note 181; *State v. Arnwine*, *id.*; *State v. Varos*, *id.*

¹⁸³ *Tyler v. United States*, 193 F.2d 24 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 908 (1952); *People v. Schiers*, *supra* note 181. *But see* *People v. Wochnick*, *supra* note 180.

¹⁸⁴ *State v. Dehart*, 242 Wis. 562, 8 N.W.2d 360 (1943). In evaluating the cases cited in this note and in note 183, *supra*, the first question is whether the evidence is relevant, and the answer must be yes. See *Tyler v. United States*, *supra* note 183. The second question is whether the evidence is too relevant, that is, whether there is a substantial risk that the jury overemphasized the evidence. The giving of a cautionary instruction may be of some help, but it does not necessarily resolve the problem. *But see* *Tyler v. United States*, *supra* note 183. However, the question can be avoided. It is not essential that the prosecutor's evidence of voluntariness contain specific reference even to the fact that a lie-detector test was taken. *State v. Varos*, *supra* note 181. If the test was taken, the defendant will, in all likelihood, so inform his attorney. However, to cover the rare case in which the defendant "holds out," the prosecutor could be required to ascertain that the defense counsel knows of the test. The onus of the dilemma would then be transferred from prosecutor to defense counsel, and there is every reason to believe that the latter would gladly accept it if it gave him any reasonable opportunity to prove that the confession was coerced. For cases involving successful and unsuccessful claims that a lie-detector examination was part of coercive acts leading to a confession, see *People v. Hills*, 30 Cal. 2d 694, 185 P.2d 11 (1947) (confession admissible); *Bruner v. People*, 113 Colo. 194, 156 P.2d 111 (1945) (confession inadmissible); *People v. Lettrick*, 413 Ill. 172, 108 N.E.2d 488 (1952) (trial court improperly limited defendant's right to cross-examine lie-detector operator regarding coercion); *People v. Sims*, 395 Ill. 69, 69 N.E.2d 336 (1946) (confession inadmissible); *Pinter v. State*, 203 Miss. 344, 34 So.2d 723 (1948) (confession inadmissible); *State v. Colett*, 58 N.E.2d 417 (Ohio App. 1944), *appeal dismissed*, 144 Ohio St. 639, 60 N.E.2d 170 (1945) (confession admissible); *Commonwealth v. Jones*, 341 Pa. 541, 19 A.2d 389 (1941) (confession admissible); *Commonwealth v. Hipple*, 333 Pa. 33, 3 A.2d 353 (1939) (confession admissible); *Prince v. State*, 231 S.W. 2d 419 (Tex. Crim. App. 1950) (confession inadmissible); All of these cases use the same point of departure: if the lie-detector is part of a coercive scheme, the resulting confession is inadmissible; if the lie-detector is used as part of a trick to induce a confession, the confession is admissible. For the view that the same rules would apply in cases of narcosis, see *Dession*, *supra* note 174, at 333-34.

The reasons tendered in support of the rule are the same as those offered in cases involving exculpatory results: (1) precedent;¹⁸⁵ (2) lack of general scientific acceptance;¹⁸⁶ (3) lack of general reliability;¹⁸⁷ (4) potential impact upon the jury;¹⁸⁸ (5) usurpation of the jury's fact-finding role;¹⁸⁹ (6) distraction of the jury;¹⁹⁰ and (7) impairment of cross-examination (hearsay).¹⁹¹ In addition, two reasons have been advanced which are peculiar to the case involving inculpatory results. The first is that the lie-detector is offensive to the traditions of a free society.¹⁹² This reason for exclusion would have some weight if the question concerned the admissibility of the results of a test forced upon the defendant. However, if the test is voluntarily undergone, it is difficult to perceive any offensive aspect. The second reason is that the admissibility of inculpatory results would prohibit the accused from making a "realistic defense."¹⁹³ The absurdity of this statement is made patent when the reason is parried with, "A realistic defense such as what? Lying?"¹⁹⁴

¹⁸⁵ *State v. Arnwine*, *supra* note 181; *State v. Trimble*, *supra* note 180. The case typically relied upon is *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923), in which exculpatory results were excluded and the defendant was convicted. Thereafter, it was learned that another person had committed the offense and that Frye's protestations of innocence were true. See *State v. Arnwine*, *supra*.

¹⁸⁶ *People v. Wochnick*, *supra* note 180; *People v. Foye*, *supra* note 181.

¹⁸⁷ *People v. Carter*, *supra* note 181; *People v. Schiers*, 329 P. 2d 1 (Cal. 1958) (dissenting opinion); *State v. Lowry*, *supra* note 180; *State v. Arnwine*, *supra* note 181; *State v. Foye*, *supra* note 181; *State v. Smith*, *supra* note 181; *Leeks v. State*, *supra* note 181. In terms of these cases, the content of "unreliability" is (1) the fear that a sensitive, innocent subject might be falsely accused by his own emotions, *State v. Lowry*, *supra* note 180; (2) the fear that a hardened criminal might "beat" the device, *id.*; (3) the fear that the jury would not be as able as the examiner to allow for unreliability, *id.*; and (4) the realization that the expertise of the examiner is crucial and that there are too few competent examiners, *State v. Arnwine*, *supra* note 181.

¹⁸⁸ *People v. Schiers*, *supra* note 187.

¹⁸⁹ *People v. Schiers*, *supra* note 187; *State v. Smith*, *supra* note 181.

¹⁹⁰ *State v. Foye*, *supra* note 181.

¹⁹¹ *State v. Lowry*, *supra* note 180; *State v. Foye*, *supra* note 181.

¹⁹² *People v. Schiers*, *supra* note 187. This reason was first explored in Silving, "Testing of the Unconscious in Criminal Cases," 69 Harv. L. Rev. 683 (1956). Professor Silving would, amazingly enough, bar the use of exculpatory results for the same reason. *Id.* at 693.

¹⁹³ *People v. Schiers*, *supra* note 187.

¹⁹⁴ On the other hand, it must be admitted that, to a certain extent, lying is encouraged by the way in which criminal law is administered. Take, for example, the offense of perjury. If defendant is tried for some other offense and is convicted over his plea of alibi, seldom is he subjected to a subsequent prosecution for perjury. Failure to prosecute may be attributable to a number of factors. But one cannot, out of hand, reject as a factor the notion that defendant should be permitted to lie in his own defense.

The lie-detector cases, considered above, indicate the likely result in the analogous cases of hypnosis or narcosis. Voluntary, inculpatory statements would be held inadmissible. The reasons in support of the rule of inadmissibility are, of course, subject to the same objection as has already been made in Part III C of this article regarding exculpatory statements. If, in a given case, the conditions of reliability have been met, the statements should be admissible. Undoubtedly, the statements would be highly prejudicial as far as the defendant is concerned. But, as a prosecuting attorney once observed, when the defense attorney objected to evidence solely on the ground that it was prejudicial, "Indeed it is prejudicial. That is precisely why I offer it."¹⁹⁵

The suggested rule of admissibility in cases involving inculpatory statements should not be taken as a criticism of the results of the decided cases. In these cases, even more than in cases of exculpatory statements, there is a failure to prove that the conditions of reliability were present. Consequently, inadmissibility was properly determined. The suggested rule is, however, a criticism of the reasoning of these cases, premised, as it is, upon standards which probably can never be met.

2. Involuntary, Inculpatory Statements.

a. *Statements induced by hypnosis.*

Toward the end of the last century, a British legal periodical recounted a proposal by Dutch authorities (the proposal was subsequently abandoned) to hypnotize a murder suspect in order to elicit clues. Had the suspect confessed, the confession would have been inadmissible; however, derivative evidence would have been admissible.¹⁹⁶ Should such a problem arise today in the United States regarding hypnosis not submitted to as a matter of choice, how would it be resolved? In answering this question, the assumption will be made that reliability can be demonstrated either by proof of the conditions of reliability or by proof of facts extrinsic to the confession which corroborate the confession.¹⁹⁷ If the assump-

¹⁹⁵ The story is not apocryphal. In my own trial experience I have been met with precisely such a "scatter-shot" objection.

¹⁹⁶ 95 Law Times 500 (1893). See also 23 Wash. L. Rep. 534, 535 (1895).

¹⁹⁷ It is interesting to note that in none of the cases already discussed has any court even commented upon corroborating evidence as a basis for demonstrating the reliability of the hypno-induced or narco-induced statement or the results of a lie-detector test. The point is of particular importance in the case of the exculpatory statement or result and in the case of the voluntary, inculpatory statement or result because it demonstrates the blind attitude of the courts against admissibility. That the corroboration approach was, and is, available to the courts is clear from its use, under the common-law rule, as a basis for the admissibility of involuntary confessions.

tion were not made, it would be necessary to assume unreliability,¹⁹⁸ and that assumption would bar admissibility.

An attack on the admissibility of a hypno-induced confession, unreliability aside, might be made either on due process grounds or on grounds of self-incrimination. The relationship between state and federal protections against self-incrimination has already been considered in but a slightly different context and will form no part of the present discussion. The problem will be explored from the standpoint of the federal due process and self-incrimination provisions, the former as it includes state cases, and the latter exclusive of state cases.

With reference to due process, the specific question is whether the confession is voluntary.¹⁹⁹ The answer of the commentators is no,²⁰⁰ and the answer finds substantial support in the few hypnosis cases in which the question was raised. In the Canadian case of *Rex v. Booher*,²⁰¹ the accused, while in jail, was visited several times by a criminologist who claimed to practice hypnotism. After the last visit the criminologist told the police that a confession would be forthcoming. Shortly thereafter, the accused called for a detective and confessed. The confession was held inadmissible as involuntary in the absence of proof that the accused did not confess under post-hypnotic suggestion. In the American case of *People v. Leyra*,²⁰² the defendant, suspected of murdering his parents, was extensively interrogated by the police during a two-day period. He made several incriminating admissions which fell far short of a confession. Thereafter, and while he was suffering from the effects of lack of sleep, he was interrogated by a psychiatrist who played upon his fears and his exhaustion and who ultimately, through

See Maguire, "Involuntary Confessions," 31 Tul. L. Rev. 124, 130-31 (1956); Comment, "Admissibility of Confessions and Denials Made Under the Influence of Drugs," 52 Nw.U.L. Rev. 666, 675 n. 45 (1957).

¹⁹⁸ For across-the-board arguments that hypno-induced confessions are unreliable, see Bannister, "Hypnotic Influence in Criminal Cases," 51 Albany L. Rev. 87, 88 (1895); Levy, "Hypnosis and Legal Immutability," 46 J. Crim. L., C. & P.S. 333, 341 (1955); Ladd, "Legal Aspects of Hypnotism," 11 Yale L.J. 173, 188-89 (1902); Note, "Hypnotism, Suggestibility and the Law," 31 Neb. L. Rev. 575, 591 (1952); 42 Harv. L. Rev. 704 (1929).

¹⁹⁹ The transition in the Supreme Court cases from the test of reliability or trustworthiness to the test of voluntariness is noted, with relevant citations, in Note, "Some Problems Relating to the Admissibility of Drug Influenced Confessions," *supra* note 178, at 99; Comment, "Admissibility of Confessions and Denials Made Under the Influence of Drugs," *supra* note 197, at 675.

²⁰⁰ Levy, *supra* note 198, at 341-43; Mueller, "The Law Relating to Police Interrogation Privileges and Limitations," 52 J. Crim. L., C. & P.S. 2, 11 (1961); Sudduth, "Hypnotism and Crime," 13 Medico-Legal J. 239, 250-51 (1895).

²⁰¹ 4 D.L.R. 795 (Sup. Ct. Alta. 1928).

²⁰² 302 N.Y. 353, 98 N.E. 2d 553 (1951).

suggestion, wheedling, and promises, obtained a confession. This interrogation, fortunately for the defendant, was tape recorded by the police. After the confession, the defendant made other confessions to his business partner, a detective, and members of the prosecutor's staff. At trial, the confessions were admitted into evidence over the objection that the confession to the psychiatrist was induced by hypnosis. The defendant was convicted, he appealed, and the New York Court of Appeals reversed the conviction on the ground that the first confession was a product of mental coercion and was, therefore, involuntary. However, the court expressly declined to state that the confession was a product of hypnosis because that issue had been submitted to the jury, and the jury had resolved it against the defendant. Leyra was retried and was again convicted, this time on the strength of the subsequent confessions. The conviction was affirmed.²⁰³ Thereafter, he petitioned the federal courts for a writ of habeas corpus, and, in the Supreme Court, he ultimately prevailed.²⁰⁴ The limited holding was that the subsequent confessions were, as a matter of law, products of the inadmissible confession to the psychiatrist. However, the following statement by Mr. Justice Black is worthy of note:

First, an already physically and emotionally exhausted suspect's ability to resist interrogation was broken *to almost trance-like submission* by the use of the arts of a highly skilled psychiatrist. Then the confession petitioner began making was filled in and perfected by additional statements given in rapid succession to a police officer, a trusted friend, and two state prosecutors. We hold that use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution.²⁰⁵ (Emphasis added.)

From this quotation, it may be argued that hypno-induced confessions are involuntary and inadmissible as violative of due process. And the argument is all the more persuasive in the light of an appendix to the Court's opinion containing extensive extracts from the tape-recorded interrogation.²⁰⁶ These extracts indicate that although hypnosis might not have been involved in *Leyra* (the psychiatrist testified that it was not), hypnotic techniques were employed and did lead to the confession. On the other hand, neither *Leyra* nor any other Supreme Court case singles out a particular

²⁰³ 304 N.Y. 468, 108 N.E. 2d 673, *cert. denied*, 345 U. S. 918 (1952).

²⁰⁴ *Leyra v. Denno*, 347 U.S. 556 (1954).

²⁰⁵ 347 U.S. at 561.

²⁰⁶ 347 U.S. at 562-84.

fact as crucial.²⁰⁷ The inquiry is based on the totality of the facts, and, as in *Leyra*, inadmissibility is based on a concatenation of events indicative of overreaching, unfairness, and non-physical brutality.²⁰⁸ Thus, the argument that hypnosis per se is a basis for inadmissibility requires a refinement of existing case law. But the refinement is not unwarranted. In the first place, it comports with the commonly understood definition of "involuntary" as "lacking will or the power to choose."²⁰⁹ Certainly a hypno-induced confession is the product of suggestion exerted during the hypnotic relationship rather than a product of conscious choice. Secondly, the refinement is consonant with such recent developments as *Mapp v. Ohio*²¹⁰ in which "privacy" was postulated as a concept underlying due process and warranting the exclusion of evidence obtained in violation of the concept.²¹¹ Here, of course, it is necessary to analogize the privacy of thoughts to the privacy or security of an abode. But the analogy is not difficult. In this regard, the dissenting opinion of Mr. Justice Brandeis in *Olmstead v. United States*,²¹² already referred to, is pertinent. After stating his position that the constitutional protection against unreasonable search and seizure should be interpreted broadly to encompass newly conceived scientific devices, he observed:

Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." Can it be said that the Constitution affords no protection against such invasions of individual security?²¹³

The conclusion that a hypo-induced confession is involuntary and inadmissible as a violation of due process if the hypnosis is not submitted to as a matter of choice does not necessarily answer the

²⁰⁷ *But see* *Gallegos v. Colorado*, 370 U.S. 49 (1962), a case which may turn upon the fact that the defendant was but 14 years old.

²⁰⁸ See, for example, *Fikes v. Alabama*, 352 U.S. 191 (1957); *Watts v. Indiana*, 338 U.S. 49 (1949).

²⁰⁹ *Funk & Wagnalls New Standard Dictionary* 1290 (1957). After the text to footnotes 207-09 was written, the Supreme Court held in *Townsend v. Sain*, 83 S.Ct. 745, 754 (1963) that, "it is difficult to imagine a situation in which the confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum.'"

²¹⁰ 367 U.S. 643 (1961).

²¹¹ See also, *Wolf v. Colorado*, 338 U.S. 25, 28 (1949): "[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

²¹² 277 U.S. 438 (1928).

²¹³ 277 U.S. at 474 (footnotes omitted).

question of whether the confession also violates the privilege against self-incrimination. On the basis of some statements in case law, there is reason to suspect that the privilege has been accorded an interpretation broad enough to encompass the hypno-induced confession. As Professor McCormick has observed:

... there is an insistent recurrence in the decisions on confessions of language which savors of privilege. Thus most courts, as a shorthand expression customarily say that the confession, to be admitted, must have been "voluntary." . . . It may well be that the adherence of the courts to this form of statement of the confession-rule in terms of "voluntariness" is prompted not only by a liking for its convenient brevity, but also by a recognition that there is an interest here to be protected closely akin to the interest of a witness or of an accused person which is protected by the privilege against compulsory self-crimination.²¹⁴

On the other hand, it is clear that the confession rule and the privilege differ in origin and scope,²¹⁵ and it is indicated in some federal and state cases that the privilege was not intended to apply to police interrogation for the reason that "since police have no legal right to compel answers, there is no legal obligation to which a privilege in the technical sense can apply."²¹⁶

But whether or not the privilege applies, the confession rule can still be relied upon as a basis for inadmissibility.

b. *Statements induced by narcosis.*²¹⁷

The conclusion that hypno-induced statements are inadmissible if hypnosis is forced upon the subject is firmly supported by case-law²¹⁸ and comment²¹⁹ involving the parallel narcosis problem.²²⁰

²¹⁴ McCormick, "The Scope of Privilege in the Law of Evidence," 16 Texas L. Rev. 447, 452-53 (1938). For cases in which due process and self-incrimination are specifically referred to as bases for inadmissibility, see *Shotwell Mfg. Co. v. United States*, 83 S. Ct. 448, 453 (1963); *United States v. Carignan*, 342 U.S. 36, 41 (1951); *Bram v. United States*, 168 U.S. 532, 542 (1897).

²¹⁵ See VIII Wigmore, Evidence § 2266 (McNaughton rev. 1961).

²¹⁶ *Id.* §2252, at 329n. 27. The cited work contains reference to state and federal cases.

²¹⁷ Excluded from consideration is the case in which the prosecutor argues that the defendant's failure or refusal to submit to interrogation under narcosis gives rise to an inference of guilt. The argument has been held improper on the theory that narco-induced statements are inadmissible as unreliable. *State v. Levitt*, 36 N.J. 266, 176 A.2d 465 (1961). *But see* *People v. Draper*, 304 N.Y. 799, 109 N.E.2d 342 (1952); *Draper v. Denno*, 113 F. Supp. 290, 293 (S.D.N.Y.), *aff'd*, 205 F.2d 570 (2d Cir. 1953) (argument not objected to; error, if any, did not have constitutional stature).

²¹⁸ *Townsend v. Sain*, *supra* note 209; *People v. Heirens*, 4 Ill. 2d 131, 122 N.E. 2d 231 (1954), *cert. denied*, 349 U.S. 947 (1955) (dictum).

²¹⁹ Despres, "Legal Aspects of Drug-Induced Statements," 14 U. Chi. L. Rev. 601, 605 (1947); Dession, "Drug Induced Revelation and Criminal Investigation," 62

c. *Forceful use of the lie-detector.*

In 1957, the American Academy of Polygraph Examiners adopted as a statement of principle that "... a polygraph examination is, and must be by its very nature, a voluntary act by the person taking the examination."²²¹ Implicit in this statement is the recognition that force may impair reliability. Hence, force would serve as an evidentiary reason for inadmissibility. Suppose, however, that force and reliability are assumed. Would the results be inadmissible for reasons of constitutional dimension? The question, it must be stressed, is not whether a subsequent confession would be admissible. That question has already been considered.²²² The specific question is whether the test results would be admissible.

Yale L.J. 315, 333-37 (1953); Sheedy, "Narcointerrogation of a Criminal Suspect," 50 J. Crim. L., C.&P.S. 118, 123 (1959). The issues are, of course, the same as in hypnosis cases: self-incrimination and due process. In the narcosis case, however, there is an added due-process factor in that physical force must be used upon the defendant. Thus, in the narcosis case there is a basis for bringing into play the test, announced in *Rochin v. California*, 342 U.S. 165 (1952), of whether the conduct shocks the conscience and runs counter to civilized standards. This basis may be present in the case of hypnosis, but it is more tenuous.

²²⁰ In *People v. Esposito*, 287 N.Y. 389, 39 N.E.2d 925 (1942), it was held that the defendants' constitutional rights were not violated by the use of truth serum to ascertain mental condition, an issue raised by the defendants' pleas of insanity at the time of the act and at the time of the trial. There is no indication in the opinion that the narcosis was not submitted to voluntarily. Apparently it was the defendants' position that voluntary submission to narcosis resulted in involuntary statements and that the latter involition had constitutional significance. In dictum, it was indicated that, assuming no voluntary submission, the use of narco-obtained evidence on the question of insanity at the time of trial raised no problem of self-incrimination. Whether this statement would apply with reference to the issue of insanity at the time of the act was not discussed. Also not discussed was the due process problem. For an argument that due process compels inadmissibility even in the insanity case, see Comment, "Admissibility of Confessions and Denials Made Under the Influence of Drugs," 52 Nw. U. L. Rev. 666, 679 (1957).

One medical aspect of narcosis, particularly relevant to a discussion of due process, is that scopolamine may produce retrograde amnesia regarding the interrogation. Muehlberger, "Interrogation Under Drug Influence," 42 J. Crim. L., C. & P.S. 513, 520 (1951). The same is true of hypnosis, Bell, "Hypnotism and the Law," 13 *Medico-Legal J.* 47, 49-50 (1895), but memory may be revived by subsequent hypnosis. Allen, "Hypnotism and its Legal Import," 12 *Can. B. Rev.* 14, 18 (1934). Thus, the subject may be at the mercy of his interrogator and may find that he is unable to dispute answers or statements attributed to him. Protection might be afforded by the presence of counsel at the interrogation, but, under current case-law, the presence of counsel is not a constitutional requirement, *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. LaGay*, 357 U.S. 504 (1958), at least prior to indictment. See *Spano v. New York*, 360 U.S. 315 (1959).

²²¹ "Statement of Principles Regarding Polygraph ('Lie-Detector') Examinations," 48 J. Crim. L., C. & P.S. 568, 569 (1958).

²²² See cases cited in note 184, *supra*.

From the standpoint of fifth or fourteenth amendment due process, it is relevant to note that the problem under consideration involves force sufficient to hold the subject in place while the various parts of the lie-detector mechanism are attached to him. The force, however, is minimal and it is therefore difficult to predicate any argument upon the existence of brutal misconduct.²²³ Moreover, force is not the factor which motivates disclosure as it does in the typical coerced confession case. Nevertheless, the subject, not as a matter of choice, is placed in a situation in which incriminatory responses are elicited from him, again not as a matter of choice. If the testimonial responses obtained by hypnosis or narcosis are involuntary, it would seem that the physiological responses adduced by the lie-detector interrogation are also involuntary, and that the interrogation constitutes as grave an incursion into the privacy of thoughts as do hypnosis and narcosis. Thus, an argument is available that due process is violated by the forcible use of a lie-detector.

As might be expected, there is a paucity of case law. In two cases the Illinois Supreme Court stated that the use of a lie-detector without the subject's consent is improper, but neither case involved the admissibility of the results.²²⁴ A problem of admissibility was involved in the California case of *People v. Schiers*.²²⁵ At the close of the prosecution's case, a police witness, in an unresponsive answer, stated that the defendant voluntarily took a lie-detector test, felt that the test was fair, was told that he was lying, was asked if he could give an explanation, and replied that the device was wrong. Thereafter, the jury was instructed to disregard all testimony about the lie-detector. On appeal, the intermediate appellate court held that the instruction cured the error, and the California Supreme Court declined to hear a further appeal. However, in a dissenting opinion by Justice Carter certain aspects of constitutionality were considered. Using (perhaps "misusing" would be more accurate)

²²³ See *Rochin v. California*, *supra* note 219.

²²⁴ In *People v. Heirens*, *supra* note 218, the court characterized as a flagrant violation of due process the unauthorized search of the defendant's abode, prolonged questioning of the defendant, use of narcosis, and use of a lie-detector. However, the defendant pleaded guilty and it was held that the proscribed practices did not induce the plea. In *People v. Simms*, 395 Ill. 69, 69 N.E.2d 336 (1946), the court held that the police could not force a suspect to take a lie-detector test and that a subsequent confession was inadmissible. See also *State v. Cole*, 354 Mo. 192, 188 S.W.2d 43 (1945), in which the defendant moved that all witnesses be compelled to take a lie-detector test. The motion was denied and the decision was affirmed primarily on the ground of unreliability. However, in a dictum it was indicated that it would be improper to subject persons to a lie-detector test without their consent.

²²⁵ 160 Cal. App. 2d 364, 324 P.2d 981, *hearing denied per curiam* 329 P.2d 1 (1958).

the stomach-pump case of *Rochin v. California*²²⁶ as a wedge, Justice Carter found the following to be shocking misconduct on the part of the state: that the defendant was told that lie-detector tests were accurate; that the police witness gave the impression that the defendant lied, although the results of the test were not introduced; that no expert testified regarding any precautions taken to insure accuracy; and that no expert testified regarding the interpretation of the results. Beyond question, Justice Carter was correct in his insistence that error had been committed because there was no proof of reliability. That the error was incurable is an entirely different proposition, and one which strikes at the very heart of the assumed efficacy of curative instructions. But for purposes of this discussion, the signal aspect of the dissenting opinion is the due process dimension ascribed to the error in spite of the fact that Schiers consented to the test. Although one may indeed question whether Schiers was deprived of due process, the dissenting opinion does support the conclusion inferable from the Illinois cases that the administration of a lie-detector test by force is a violation of fifth and fourteenth amendment due process.

As noted above in connection with hypno-induced confessions, the due process problem is easier to resolve than is the self-incrimination problem. With reference to lie-detector results, the latter problem is even more complicated because of the rule that the privilege applies only to testimonial utterances. Can it be said that the subject's physiological reactions are testimonial in nature? To most commentators, a negative answer is required by analogy to those cases in which an accused may be compelled to submit to fingerprinting or an examination of his body or body fluids, or to speak or write or give some physical demonstration for purposes of identification.²²⁷ But the analogy is superficial and it obliterates any doctrinal consideration of the requirement of testimonial compulsion. What is necessary is an intelligent analysis, and Dean Wigmore has accomplished it:

Unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be placed *as involving his consciousness of the facts and the operations of his mind in expressing it*, the demand made upon him is not a testimonial one.²²⁸

Under this analysis, although testimonial compulsion would be

²²⁶ *Supra* note 219.

²²⁷ Hardman, "Lie Detectors, Extrajudicial Investigations and the Courts," 48 W. Va. L. Rev. 37, 39 (1941); Note, 29 Cornell L.Q. 535 (1944); Note 44 Harv. L. Rev. 842 (1931).

²²⁸ VIII Wigmore, Evidence § 2265, at 386 (McNaughton rev. 1961).

absent in the fingerprint case, it would be present in the lie-detector case because the physiological reactions are predicated upon the subject's consciousness of facts and because the purpose of the interrogation is to elicit the reactions.²²⁹ But even if testimonial compulsion is present, the question still remains whether the privilege applies to police interrogations, and, as indicated above, the answer is in doubt.

d. *Derivative evidence.*

Suppose that *D* is suspected of murder. The police, without probable cause, enter *D*'s house, conduct a general search, and find a diary in which *D* admits that he killed the deceased and that he buried his own blood-spattered clothes and the murder weapon, a hammer, in his basement. Thereafter, the police find the clothes and the hammer, and analysis discloses *D*'s fingerprints on the hammer. In a federal court, the diary would be inadmissible as the product of an unreasonable search, and the clothes and hammer would be inadmissible as derivative evidence or fruit of the poisoned tree.²³⁰ In a state court, the fourteenth amendment's due process clause would, under *Mapp v. Ohio*,²³¹ bar admissibility of the diary and, although the matter is not clear, arguably *Mapp* would also bar admissibility of the derivative evidence.²³²

Suppose, however, that hypnosis or narcosis is used in lieu of a search, that *D* reveals under hypnosis or narcosis the location of the clothes and hammer, and that the clothes and hammer are subsequently found. The statements made by *D* are, as indicated above, inadmissible as involuntary. But what of the derivative evidence? By analogy to the search cases, it might be expected that an exclusionary rule applies, but the expectation is groundless in

²²⁹ Dean Wigmore (perhaps Professor McNaughton) is reluctant to come out foursquare in favor of this result. His hedging conclusion is that the lie-detector case "is not far logically and intuitively from those cases in which the suspect is compelled to make an incriminating communication of knowledge—a compulsion proscribed by the privilege." *Id.* § 2265, at 400.

The only case remotely in point is *People v. Schiers*, *supra* note 225, in which Judge Carter, dissenting, finds testimonial compulsion to be present.

²³⁰ *Nardone v. United States*, 308 U.S. 338 (1939); *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920).

²³¹ *Supra* note 210.

²³² For a tacit assumption that *Mapp* embodies the derivative evidence rule, see Day & Berkman, "Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of *Mapp v. Ohio*," 13 W. Res. L. Rev. 56, 74, 96-98 (1961). For a prediction that *Mapp* will be so interpreted, see Allen, "The Exclusionary Rule in the American Law of Search and Seizure," 52 J. Crim. L., C.&P.S. 246, 254 (1961). Professor Allen's prediction recently came to fruition in *People v. Rodriguez*, 11 N.Y.2d 279, 183 N.E.2d 651 (1962), in which the derivative evidence was a confession.

terms of state case law²³³ and the Supreme Court has apparently never considered the point. Wigmore dismisses the point brusquely:

It was once contended that the impropriety of the inducement to the confession tainted the facts discovered in consequence of it, and that they also, as well as the confession, should remain inadmissible. Such a doctrine needs only to be stated to expose its equal lack of logic, principle, and expediency.²³⁴

The asserted illogic, lack of principle, and inexpediency are understandable only if consideration is given to the origin of the confession rule. The rule barring improperly obtained confessions was, at common law and in the early constitutional cases, premised upon the reasonable assumption of unreliability,²³⁵ and trustworthiness was the criterion of admissibility. If real evidence could be derived from the confession, the confession was pro tanto shown to be reliable. Not only was the evidence admissible, the confession either entirely or in corroborated part was in many jurisdictions also admissible.²³⁶ However, in the past 25 years the basis for the rule has shifted from trustworthiness to a concept of volition rooted in fair play. Thus, in *Lisenba v. California*,²³⁷ it was stated that "the aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."²³⁸ Presumably this shift has been motivated by a desire to make it unprofitable for agents of the state to engage in unconscionable conduct,²³⁹ a desire which also underlies the exclusionary rule in search and seizure cases.²⁴⁰ And, if this is the rationale of the more recent cases, it is difficult to carve out an exception for evidence derived from the confession. To paraphrase Dean Wigmore, such an exception needs only to be stated "to expose its equal lack of logic, principle, and expediency." One may, therefore, predict that in due time an exclusionary rule will be applied to evidence derived from an involuntary confession.

E. *Admissibility on Stipulation of Hypno-Induced Statements.*

No cases have been found involving the question of whether a court will or should recognize a stipulation as to the admissibility

²³³ Cases are collected in 3 Wharton, Criminal Evidence § 358 (12th ed. 1955). For a recent case in which it was held that derivative evidence was inadmissible, see *People v. Ditson*, 20 Cal. Rptr. 165, 369 P.2d 714 (Cal. 1962), noted in 50 Calif. L. Rev. 723 (1962).

²³⁴ III Wigmore, Evidence § 859 (3rd ed. 1940).

²³⁵ *Id.* §§ 822, 826.

²³⁶ See *State v. Cocklin*, 109 Vt. 207, 194 Atl. 378 (1937).

²³⁷ 314 U.S. 219 (1931).

²³⁸ *Id.* at 236.

²³⁹ See Mueller, *supra* note 200, at 2, 4-5.

²⁴⁰ See Allen, *supra* note 232, at 247 n. 7, 251.

of hypno-induced statements. The issue was not decided in *State v. Nebb* because that case involved only the prosecutor's discretion and not the presentation of hypno-induced statements to the jury. However, a helpful analogy may be drawn between the hypnosis problem and the problem of lie-detector and truth serum.

Initially, it must be recognized that if the stipulation is to be effective under any circumstances, it must relate to admissibility rather than solely to the administration of the test. In *Orange v. Commonwealth*,²⁴¹ the prosecution agreed to a narco-interrogation of the defendant but the agreement did not include a stipulation of admissibility. The narco-induced statements were excluded from evidence and the exclusion was affirmed on appeal.

If the stipulation relates to admissibility, it is likely that the stipulation will be given effect. In the earlier cases there was a decided split of authority, some cases sustaining the stipulation²⁴² and other cases rejecting it.²⁴³ However, in the more recent cases there can be discerned a trend toward giving effect to the stipulation.²⁴⁴ The most comprehensive treatment of the problem is to be found in the recent lie-detector case of *State v. Valdez*²⁴⁵ in which the Arizona Supreme Court adhered to the general rule of inadmissibility in the absence of stipulation, but recognized the efficacy of a stipulation upon the following conditions: (1) that the stipulation relate to admissibility; (2) that the trial judge have discretion to exclude the evidence if it appears that factors of unreliability are present; (3) that the opposing party be permitted a full and fair cross-examination of the expert witness; (4) that the jury be instructed that unfavorable results are not proof of any element of the offense but relate only to the defendant's belief at the time of the examination; and (5) that the jury be instructed that the weight to be accorded the evidence is a matter for jury consideration. Given these conditions, the stipulation has the effect of avoiding the general rule that the evidence is inadmissible as unreliable. Indeed, in these conditions are the seeds of the arguments advanced in this article against the general rule of inadmissibility and in favor of a

²⁴¹ 191 Va. 423, 61 S.E.2d 267 (1950). For a sample stipulation form, see Inbau, *Lie Detection and Criminal Interrogation* 135 (3d ed. 1953).

²⁴² *People v. Houser*, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947) (dictum); *Orange v. Commonwealth*, *supra* note 241 (dictum).

²⁴³ *Stone v. Earp*, 331 Mich. 606, 50 N.W.2d 172 (1951) (civil case); *LeFevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943).

²⁴⁴ *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962); *State v. McNamara*, 252 Iowa 19, 104 N.W.2d 568 (1960). *Contra*, *State v. Trimble*, 68 N.M. 406, 362 P.2d 788 (1961).

²⁴⁵ *Supra* note 244. The case is commented upon in 5 Ariz. L. Rev. 76 (1963).

rule of admissibility governed by an evaluation of the proof of criteria of reliability in the particular case. *Valdez* is a step in the right direction. The next step is to discard the general rule of inadmissibility and to shift the conditions from the context of stipulation to the context of a rule permitting admission of the evidence.

F. *The Use of Hypno-Induced Statements on the Issue of Sanity.*

Although the use of hypnosis in psychiatric techniques is far from widespread, the psychiatrist who engages in hypnosis is hardly a maverick. Reputable psychiatrists do use hypnosis,²⁴⁶ and the technique has received the approval of the American Medical Association.²⁴⁷ What, then, should be the status of the testimony of a psychiatrist regarding the mental condition of an accused if the testimony rests in some part on hypno-induced statements? Two separate problems are presented: hypnosis leading to proffered testimony of sanity and hypnosis leading to proffered testimony of insanity. If these problems are approached in accordance with the suggestions already made in this article, the answer to the above question is that the testimony should be admissible. What is at stake in the insanity case is the predicate for the doctor's diagnosis. Presumably the doctor, an expert, has taken into account the various factors which may influence the reliability of the predicate and has balanced them intelligently in arriving at his diagnosis. And, because the issue of insanity is one that is typically committed to the testimony of experts, the possible "usurpation" of the jury function is tolerated. These arguments are equally weighty when considered in the context of the prevailing rule of inadmissibility (unreliability) insofar as statements on the merits are concerned, and the discussion herein will be devoted exclusively to that consideration.²⁴⁸

The hypnosis cases are so few in number and so meager in analysis that discussion of them in vacuo is meaningless. Consequently, attention will first be given to the relatively advanced

²⁴⁶ For an explanation of the use of hypnosis in psychiatry see Schneck, "Hypnosis in Psychiatry," in *Hypnosis in Modern Medicine* 143 (1959).

²⁴⁷ Bryan, *Legal Aspects of Hypnosis* 33 (1962).

²⁴⁸ Consideration will not be given to the voluntary-involuntary dichotomy under this heading. The privilege against self-incrimination is generally regarded as inapplicable to the issue of sanity, VIII Wigmore, *Evidence* § 2265, at 399 (McNaughton rev. 1961), and a due process argument is weakened by the fact that the issue arises as a result of the defendant's own plea of insanity.

Nor will consideration be given to such possible objections as the hearsay rule or the physician-patient privilege. For a clear indication that these objections have not proved insuperable in narcosis cases, see Dession, *supra* note 219, at 315, 323-25.

development of the related narcosis problem. The general rule of inadmissibility is well entrenched in narcosis cases. Nevertheless, courts usually have found the rule no barrier if the issue concerns sanity, and the expert's testimony has been held admissible whether in favor of the accused²⁴⁹ or against him.²⁵⁰ Although the bugaboo of unreliability has been raised by counsel in these cases, it has been dismissed with the observation that the use of narco-analysis is recognized as a part of the psychiatric evaluative judgment, and that the expert should be permitted to testify on the basis of the information made available to him and used by him in reaching a conclusion as to the accused's mental condition.²⁵¹ Why this same reasoning in support of reliability is not applicable when the issue is the admissibility on the merits of a narco-induced statement is never discussed in the cases. Like Topsy, it would appear, these divergent approaches have grown, unimpeded by intelligent cross-fertilization. Similarly, objections based on the hearsay rule have received (and deservedly so) judicial short shrift when the issue concerns mental condition. Typically it is said that the narco-induced predicate for the expert's opinion is offered not for the truth of the matters contained therein but merely for a predicative purpose.²⁵² But courts never consider that this purpose may encompass an evaluation by the expert of the credibility of the predicate, an evaluation which is tacitly passed on to the fact-finder.

In short, most courts live in two different worlds in narcosis cases depending upon whether the issue concerns the admissibility of narco-induced statements on the merits or the admissibility of narco-induced statements as a predicate for expert opinion of mental condition. Why this should be so is not easy to explain. One possible answer has already been suggested. The issue of mental

²⁴⁹ *People v. Cartier*, 51 Cal. 2d 590, 335 P.2d 114 (1959). *Contra*, *People v. Ford*, 304 N.Y. 479, 107 N.E.2d 595 (1952).

²⁵⁰ *People v. Esposito*, 287 N.Y. 389, 39 N.E.2d 925 (1942); *Brown v. State*, 304 P.2d 361 (Okla. Crim. 1956). See also *People v. Jones*, 42 Cal. 2d 219, 266 P.2d 38 (1954), in which it was held that the trial court erred in excluding the testimony of a psychiatrist, based on a sodium pentothal interview, that the accused did not possess the characteristics of a sex deviate ascribed to him by an accusation of lewd conduct with a child. *Contra*, *State v. Sinnott*, 43 N.J. Super. 1, 127 A.2d 424 (1956). For discussions of the problem raised by *Jones* and *Sinnott*, see Falknor & Steffen, "Evidence of Character: From the 'Crucible of the Community' to the 'Couch of the Psychiatrist,'" 102 U. Pa. L. Rev. 980 (1954) (attacking *Jones*); Curran, "Expert Psychiatric Evidence of Personality Traits," 103 U. Pa. L. Rev. 995 (1955) (attacking Falknor & Steffen).

²⁵¹ *People v. Esposito*, *supra* note 250; *Brown v. State*, *supra* note 250. In *State v. Sinnott*, *supra* note 250, a "personality trait" case, exclusion was grounded on unreliability coupled with all of the fears usually expressed in cases involving admissibility on the merits of narco-induced statements.

²⁵² *People v. Cartier*, *supra* note 249; *Dession*, *supra* note 219, at 324.

condition cries out for expert assistance. Because the expert is all-important, the rules are fashioned to facilitate his task and to make open in the courtroom those processes practiced by him in his office. But the issue of credibility on the merits has traditionally been entrusted to the jury. The jury has, therefore, become a sacred cow whose ruminations are protected against encroachment by the imposition of rules demanding an impossible standard of certainty.

With the narcosis problem in the background, consideration may now be given to the problem of hypnosis as related to mental condition. The leading case (indeed, the only reported case) is the California decision of *People v. Busch*.²⁵³ The defendant was charged with three counts of murder and one count of assault with intent to commit murder. His defense was partial insanity, and it was supported by the testimony of a psychologist and a psychiatrist. To this testimony the defendant sought to add the testimony of one Dr. Bryan, a general practitioner, who, less than a year before the trial, began to specialize in the use of hypnosis. From the proffered testimony of Dr. Bryan it was clear that he had examined the defendant extensively through hypnosis and that in his opinion the defendant was incapable of deliberation, premeditation, and intention to kill. The proffered testimony was objected to on three grounds: unreliability of hypno-induced statements as a basis for opinion as to mental condition, lack of expert qualifications, and hearsay. The objection was sustained, defendant was convicted on all counts, and he appealed contending, *inter alia*, that the court erred in excluding Dr. Bryan's testimony. However, the decision was affirmed. One ground for the affirmance, beyond attack in this article, was that Dr. Bryan was not sufficiently qualified. The other ground was unreliability.

In laying a foundation for the introduction of opinion evidence of the state of mind of a defendant based upon the use of a technique not theretofore recognized by the courts as sufficiently reliable to form the basis for such an opinion, at the very least, some showing of its successful use in the examination of others than the defendant for the same purpose, either by the witness or by other experts in the field, would appear to be required. We are persuaded that under the circumstances herein narrated the trial judge did not act unreasonably in his determination that a proper foundation was not established as to the reliability of an analytical tool still seeking recognition in the field of psychiatry. . . .²⁵⁴

²⁵³ 56 Cal. 2d 868, 366 P.2d 314 (1961). See also the unreported New York case of *People v. Smith* (1933), referred to in Allen, "Hypnotism and its Legal Import," 12 Can. B. Rev. 80, 91n. 34a (1934). In the *Smith* case, hypno-induced testimony was used to establish insanity at a pre-trial insanity hearing.

²⁵⁴ 56 Cal. 2d at 878, 466 P.2d at 319-20.

The meaning of the quoted passage is disturbingly vague. First, note the reference to "a technique not theretofore recognized by the courts as sufficiently reliable to form the basis for such an opinion." If, by this reference, the court intended to assimilate to the general run of hypnosis cases the hypnosis-insanity problem, the court misconceived its approach as is amply demonstrated by the narcosis cases, two of them California decisions.²⁵⁵ If, on the other hand, the court intended to stress the absence of precedent for admitting expert opinion based on hypno-induced statements, it should have noted that *Busch* was a case of first impression, that there was also no precedent for exclusion, and that the analogous narcosis cases favored admissibility. In view of this last fact, it seems appropriate to place upon the court's statement an interpretation against reliability even in the context of the insanity problem. This interpretation is buttressed by the court's impossible demand for "some showing of its successful [how can this ever be shown?] use in the examination of others." Ultimately, however, the case may rest upon the court's finding "that a proper foundation was not established as to the reliability of an analytical tool still seeking recognition in the field of psychiatry." If this means only that the defense attorney failed to show that hypnosis is used by a reasonable percentage of reputable psychiatrists, the decision cannot be criticized. But if the reference means that foundation evidence is insufficient unless it demonstrates that most psychiatrists use hypnosis, the court has indeed struck a blow against scientific methods of proof including previously sanctioned narcosis.

IV. SUMMARY AND CONCLUSION.

The general rule of inadmissibility applied in cases of inculpatory and exculpatory statements is inflexible and unrealistic. The requirements of general acceptance and high reliability do not prevail with reference to lay testimony, yet are used to frustrate the testimony of experts. The suggestions contained in this article for a case-by-case approach to the problem of admissibility, an approach premised on proof of established criteria rather than on assumptions of unreliability and fears of jury-function usurpation, find support in the stipulation and sanity cases. The suggestions are not intended as a cure-all. It may well be that proof of criteria of reliability will in many cases be difficult. It may well be that the suggestions will result in a rule of limited practical application. But, at least at the verbal level, law ought to keep in step with related disciplines, and the rules should facilitate rather than frustrate the law's ability to take advantage of scientific developments.

²⁵⁵ *People v. Cartier*, *supra* note 249; *People v. Jones*, *supra* note 250.

Dean Wigmore has stated that "if there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it."²⁵⁶ More to the point, however, is the statement of the New Jersey court in *State v. Sinnott*:

The specialty of psychiatry has developed with the increasing knowledge of mental mechanisms, maladjustments, and the causations of human behavior, normal and abnormal. Perhaps it may be said with some measure of truth that over a period of years the law has lagged watchfully, inquisitively, maybe critically behind an adaptable recognition of the progress being attained in psychiatry. It is, however, a natural characteristic of the law, resting as it does on established precedents and attitudes that have received general acceptance, to follow rather than lead in the initial introduction of probationary advances of science.²⁵⁷

It can hardly be disputed that caution is a desirable attribute of any discipline that seeks to effect cures or to probe thoughts or to resolve disputes through the imposition of sanctions. But that law should, in the formulation of its rules, impede communication with related discipline is disputable. Law, like the traveller, purports to be ready for the morrow.²⁵⁸ But, unless inordinate, precedent-oriented caution is dissipated, it may be found, too late, that the morrow was yesterday.

²⁵⁶ III Wigmore, Evidence § 875, at 368 (3rd ed. 1940).

²⁵⁷ 43 N.J. Super. at 8-9, 127 A.2d at 428 (1956).

²⁵⁸ See Cardozo, The Growth of the Law 20 (1924).